90-1293

Supreme Court, U.S.
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NO. 90-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENE SCROGGY, WARDEN — Petitioner

versus

PAUL KORDENBROCK — Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND HARMLESS ERROR IN THE ADMISSION OF RESPONDENT'S CONFESSION, OBTAINED IN A NON-CONSTITUTIONAL VIOLATION OF MIRANDA V. ARIZONA, WHERE OVERWHELMING EVIDENCE OF RESPONDENT'S GUILT EXISTED AND HIS PERSONAL CONFESSION AT TRIAL WAS PART OF AN OVERALL TRIAL STRATEGY.

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Gene Scrcggy, Warden, petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Sixth Circuit is reported as Kordenbrock v. Scroggy, 919 F.2d

1091 (6th Cir. 1990). (Appendix A-1). The three judge panel opinion of the United States Court of Appeals for the Sixth Circuit is reported as Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989). (Appendix A-95). The opinion of the United States District Court for the Eastern District of Kentucky is reported as 680 F.Supp. 867 (E.D. Ky. 1988). (Due to extreme length, ten complete copies have been lodged with this Court; pertinent portions appear in Appendix A-130). The opinion of the Kentucky Supreme Court is reported as Kordenbrock v. Commonwealth, 700 S.W.2d 384 (Ky. 1985), cert. denied, 476 U.S. 1153 (1986).

JURISDICTION

The en banc order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered November 21, 1990 (Appendix A-1). Jurisdiction of this Court to review the opinion of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On Thursday, January 3, 1980, respondent and Michael Kruse were in the Florence, Kentucky Western Auto Store from 1:00 p.m. to 1:30 p.m. Store owner William Thompson was alone in the store as his sole employee, Stanley Allen, was at lunch. Respondent and

Kruse looked at the wood-cutting tools in the rear of the store. They indicated they were moving and needed to cut firewood. Mr. Thompson was suspicious of the pair as they acted like potential shoplifters.

The next day, respondent and Kruse again visited the store between 1:00 p.m. and 1:30 p.m. The pair looked at guns in a locked glass display case. Respondent asked Mr. Thompson to show him a Colt Python pistol from the case. Mr. Thompson's suspicions were again raised as both men continued to act like shoplifters and made motions as well as talked about something in the rear of the store.

Between 9:00 and 10:00 Friday evening, respondent and Kruse attended a party at the Cincinnati apartment of respondent's sister. Respondent arrived in a woozie and red-eyed state and was seen drinking beer and smoking marijuana. He also took cocaine and drank whiskey. Kruse supposedly ingested ten

quaaludes, drank beer and smoked marijuana. Both respondent and Kruse spent the night at the apartment.

Saturday morning, Kruse ingested three to four Quaaludes and drank three to four beers. Respondent drank two beers and ingested two Quaaludes. They left the apartment and bought ten Quaaludes from Jeffrey Piper at the gas station where Kruse was employed. They proceeded to the Western Auto Store.

Kruse later told his father that he and respondent decided to take the guns from Western Auto, but, not to hurt anyone. The "plan" was to sell the guns to get money to buy more drugs.

Kruse parked on the flat lot across the street from the Western Auto. Respondent reached under the seat of the car and grabbed a gun. Both men entered the store at the same time. Mr. Thompson looked up and saw respondent pointing a gun at him. Respondent ordered Mr. Thompson to the rear of the store and told him

to lie face down. Mr. Thompson told Mr. Allen to lie down also. Both men lay face down, head to head in a nine o'clock position. Respondent stood over both with the gun.

Mr. Thompson heard respondent yell "get the customer". A man and his son had entered the store. Kruse came up to the man from the back of the store or storeroom. Kruse answered negatively to his question of whether the store repaired chain saws. The man and child then left.

Mr. Thompson heard no conversation between respondent and Kruse. He did, however, hear glass break and figured it was the glass gun case. Mr. Thompson then heard a shot and felt a searing and burning sensation in the back of his head. He next heard a second shot which he knew was for Mr. Allen. Respondent, a former marksman in the Marine Corps, fired from a distance of seven to eight feet at both men's heads "so they wouldn't get up". He then

carried a cardboard box to the front of the store in which to place the guns. Respondent carried the box out of the store and across the street to Kruse's car. Kruse drove and respondent ducked down in the seat.

Although he was still alive and bleeding, Mr. Thompson was afraid to move for fear of being shot again. When he finally noticed respondent was gone, Mr. Thompson got up. He knew Mr. Allen was dead. He called the police, the ambulance, his wife and Mr. Allen's wife. Neither Mr. Thompson nor Mr. Allen offered any resistance at any time.

Respondent and Kruse drove to several friends' houses to sell the stolen guns. Two of the friends recognized respondent's picture when it appeared on the local news in a story about the robbery and murder. The two cooperated with police and respondent and Kruse were arrested.

During questioning by police, respondent orally confessed to the murder,

attempted murder and robbery. Respondent admitted guilt and then attempted to stop the questioning. The interrogation continued and respondent gave additional details and said he shot the two victims so "they wouldn't get up." He also signed a written statement admitting his crimes. (Appendix A-163). Before trial, respondent filed a motion to suppress his confession claiming police had failed to cease questioning when he attempted to exercise his right to remain silent. The trial court denied respondent's motion after an evidentiary hearing.

During its opening statement at trial, the Commonwealth told the jury respondent had confessed. (As part of his case-in-chief, the prosecutor introduced respondent's written statement. Appendix A-162). Immediately after the Commonwealth's opening statement, respondent personally gave an opening statement in which he admitted his participation in the robbery and his shooting of Mr. Thompson and Mr. Allen.

(Appendix A-166). Respondent told the jury he was "all messed up" from liquor and quaaludes and "never intended to shoot anybody." During closing argument, respondent's counsel reiterated the confession. In the penalty phase, defense counsel and witnesses offered respondent's confession and remorse as a mitigating factor.

The jury found respondent guilty of murder and attempted murder. Respondent plead guilty to committing the robbery in the midst of trial. He was sentenced to death on the murder offense, twenty (20) years on the attempted murder offense and twenty (20) years on the first degree robbery offense.

The Kentucky Supreme Court affirmed respondent's convictions. Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384 (1985). Respondent subsequently filed a petition for writ of habeas corpus in United States District Court. The United States District Court for

the Eastern District of Kentucky found respondent's confession during police questioning was not a product of coercion. The district court did, however, find respondent's confession was obtained in violation of his Miranda rights as the police failed to cease questioning upon respondent's request. 680 F.Supp. at 877. Relying on Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) and Martin v. Wainwright, 770 F.2d 918 (11th Cir., 1985) (modified on other grounds in 781 F.2d 185 (11th Cir., 1986), cert. denied, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281, the District Court determined, however, admission of respondent's statement at trial was harmless error, or in the alternative, any error was waived by respondent when he confessed during his opening statement. (Appendix A-130).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. In a unanimous opinion, the three-member panel

of the Court of Appeals affirmed the District Court's findings. Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989) (Appendix A-95). Respondent's suggestion for rehearing en banc was granted. Kordenbrock v. Scroggy, 896 F.2d 1457 (6th Cir. 1990). Narrowly, by a 7 - 6 vote, the Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (Appendix A-1). The majority declined to hold the admission of respondent's confession was harmless error. (Id.) This petition for a writ of certiorari to review the judgment of the en banc panel of the United States Court of Appeals for the Sixth Circuit now follows.

REASONS FOR GRANTING THE WRIT

This Court should grant review because the Sixth Circuit Court of Appeals has misapplied controlling case law from this Court. Additionally, in narrowly reversing this

case, the first capital case to be reviewed by the Sixth Circuit, the court below has created a conflict with the Eleventh Circuit and has even ignored one of its own prior decisions. Furthermore, two judges refused to apply harmless error analysis because this is a capital case. Quite simply, the Sixth Circuit has incorrectly decided an issue which is certain to recur. Review by this Court is essential to clarifying the boundaries of the Fifth Amendment when a technical Miranda violation occurs.

The Fifth Amendment guarantees "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." A violation of this guarantee occurs when a person is "compelled" by governmental coercion to bear witness against himself in the criminal process. See Colorado v. Connelly, 479 U.S. 157, 163-164, at n. 1, 107 S.Ct. 515, 93 L.Ed.2d 473 (1964).

Respondent argued he was "compelled" to confess at trial because the trial court overruled his suppression motion and the Commonwealth told the jury in opening statement respondent had confessed. The en banc majority of the Sixth Circuit held that respondent's decision to confess in his opening statement was a response to the trial court's pre-trial ruling and declined to recognize that respondent's actions were trial strategy and his only avenue of defense. The en banc majority specifically rejected this Court's decision in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

In Elstad, the petitioner contended his confession was tainted by an earlier failure to provide Miranda warnings and should have been excluded as "fruit of the poisonous tree." This Court concluded it would be an unwarranted extension of Miranda to hold a simple failure to administer the warnings, unaccompanied by any

actual coercion or attempt to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is worthless. The test, this Court stated, is whether the subsequent confession was knowingly and voluntarily made. 470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at 232.

In Martin v. Wainwright, supra, the Eleventh Circuit held the reasoning of Elstad applied to a situation precisely the same as respondent's. In Martin, police did not honor a suspect's request to discontinue questioning. The suspect confessed during questioning and confessed again several days later. In applying Elstad, the Eleventh Circuit held since the police had violated only "the technical requirements of Miranda" and "not the Fifth Amendment itself," the absence of coercion in the first confession rendered the fruit of the poisonous tree doctrine inapplicable. The

Eleventh Circuit thus held the Miranda violation in the first confession did not automatically require exclusion of the second confession. Martin, 770 F.2d at 928.

The Sixth Circuit's decision to ignore Elstad also disregards decisions by the First Circuit in Bryant v. Vose, 785 F.2d 364 (1st Cir. 1986) and the Eighth Circuit in United States v. Packer, 730 F.2d 1151 (8th Cir. 1984). See also Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166, 180 (1989) (O'Connor, J., concurring) and Michigan v. Harvey, 494 U.S. ___, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).

The question in the present case is whether respondent's personal confession to jurors during his opening statement was made knowingly and voluntarily. Respondent claims his decision to confess during opening statement was "tainted by the improper procurement of the

confession and the erroneous ruling of the trial judge."

The District Court's findings more accurately reflect the situation:

> As has been stated, petitioner delivered his own opening statement at the trial at which time he reiterated his confession to having been one of the robbers of the store and to being the one who shot the two clerks. In the opening statement he denied knowing why he had shot the two men. This was part of a strategy to lay the basis for an argument to be made later by his attorneys that he lacked the intent to commit murder because he was under the influence of drugs. It was also part of the defense strategy to appeal to the sympathy of the jury by having petitioner express his regret for his acts in the opening statement. This strategy was further pursued by his able counsel by having petitioner plead guilty to the robbery later in the proceedings, and by arguing during the penalty phase after conviction that petitioner had resolved to mend his ways and reform his life, as evidenced in part by his forthright confession.
>
> Obviously, the reiteration of the confession in the opening statement was completely voluntary

> and made only after petitioner was fully advised of his rights by his own trial counsel. Indeed, no claim is made to the contrary.

(Appendix A-141). Respondent knowingly and voluntarily confessed to the shootings during his opening statement. This cunning strategy allowed respondent to personally address jurors without subjecting himself to cross-examination.

The en banc opinion misinterprets the effect of respondent's confession by refusing to hold its admission harmless. In the face of overwhelming evidence of respondent's guilt and the obvious necessity of appellant's actions as his only possible defense, the en banc majority focused on one minute sentence in respondent's confession to the exclusion of all else. While the majority acknowledged that "circumstantial evidence surrounding the shootings supports a finding of intent to kill," it still found it impossible to state that respondent's admission he shot them so "they wouldn't get up" did not

affect the outcome of the guilt and sentencing phases. Judge Kennedy's dissent more accurately sets forth the true extent of the overwhelming evidence of respondent's guilt and respondent's defense thereto:

> It is beyond a reasonable doubt that the verdict of guilty of capital murder against appellant would have been the same regardless of the admission of the confession. The evidence establishing appellant's guilt in the murder and shooting was overwhelming. The surviving victim of the shooting positively identified appellant and testified how the murder and attempted murder occurred. Appellant, in the course of robbing the store, ordered the two store employees to the back room, forced them to lie prone, and then shot them execution-style. Even if the confession had not been admitted, the only defense available to appellant would be to admit the killing and shooting, but to deny intent because of drug and alcohol use.
>
> The identity of appellant was conclusively established. William Thompson, the surviving victim, had ample opportunity to observe appellant. Two days before the robbery appellant and Michael

Kruse were at the Western Auto store from 1:00 to 1:30 p.m. examining woodcutting tools. Thompson was alone at the store and Stanley Allen was at lunch. The next day, appellant and Kruse again went to the store at 1:00 p.m., and appellant purchased a hatchet. Appellant also saw several guns in a glass display case and asked to look at a Colt Python pistol. Thompson showed him the gun and appellant and Kruse left the store without incident.

Further, less than an hour after the robbery, appellant and Kruse went to a Gary Ramell's home where they sold him three of the stolen guns for $200. They then went to the home of Richard Fehler where at 10:30 a.m. they sold two guns, payment for which was due January 15, 1980. According to Fehler, appellant appeared jittery and took some Quaaludes. That afternoon, appellant met a Larry Hensley who purchased six guns for $300, payable the next day. In the meantime, Ramell saw a newscast about the robbery and murder which included composite drawings resembling appellant and Kruse. Hensley also saw the news and noticed that the guns he bought from appellant came in a Western Auto box containing broken glass. Ramell, Fehler, and Hensley decided to cooperate with the police. Hensley arranged to

meet appellant at 10:00 p.m., the day following the robbery, to pay for the guns he received from appellant. Appellant was arrested at 10:10 p.m. that night.

Any claim of accidental shooting was impossible in view of the manner in which both store employees were shot. The only possible explanations for shooting the men, one in the back of the head and the other in the back of the neck, were that they were attempting to get up or that appellant was attempting to execute them so they could not identify the robbers. In the absence of diminished capacity, intent to kill was the only possible inference a reasonable juror could infer from the circumstances of the crime. The confession that he shot them so "they wouldn't get up" could not affect the outcome.

Had the illegal portion of appellant's confession been suppressed, appellant would have been required to adopt the same trial strategy out of necessity because he was not in a position to claim he did not commit the murders. (Footnote omitted). Before Kordenbrock asked to stop the interrogation, he had admitted committing the murder. This admission was made after he waived his Miranda rights. The basic admission of guilt was thus not

obtained in violation of Miranda. He would have admitted the shooting and he would have claimed diminished capacity through drug and alcohol use. Given the strength of the circumstantial evidence establishing intent, his statement that he shot the men so "they wouldn't get up" gave relatively little additional basis for establishing intent. The most persuasive, damning indication of his intent lay not in the statement that he shot them so "they wouldn't get up," but rather in the facts and circumstances surrounding the crime. The statement in the confession is equivocal on the question of whether it proves intent--it could be an explanation for why he shot the men, or it could be an additional fact gratuitously added at the time of his confession. With or without admission of the confession, appellant would have to at least admit the fact that he shot the two men. The fact that he said in his written confession that he shot them so they wouldn't get up is no more indicative of intent to kill than would be the phrase "I shot them so we could escape" or "I shot them so they would not identify us." Once the circumstances of the shooting were established, there was no explanation except diminished capacity under which the jury would not infer intent to kill.

(Appendix A-38). Based upon this recitation of proof, respondent's statement that he shot the two victims so "they wouldn't get up" did not affect the jury's guilty verdict or death sentence. Thus, use of the confession was harmless.

The en banc majority opinion also ignores its own precedent. In Burks v. Perini, unpublished opinion, 810 F.2d 199 (6th Cir. 1986), cert. denied, 481 U.S. 1052, 107 S.Ct. 2188, 95 L.Ed.2d 843 (1987), the Sixth Circuit held admission of an invalidly obtained confession was harmless and rejected the defendant's claim that he confessed to the jury as part of his defense strategy only because the trial court erroneously admitted his illegal confession. (Appendix A-155). Under circumstances impossible to distinguish from the case at bar, Burks shot two men, one of whom died and the other of whom survived. The surviving victim testified Burks had shot both

men without provocation. The Sixth Circuit concluded, in light of the substantial independent evidence that Burks had indeed shot both of the victims and that the shootings were unprovoked, a self defense theory was the only recourse available to Burks to justify the shootings. Accordingly, the Sixth Circuit concluded the state's use of Burks' invalidly obtained statement did not induce him to testify and the trial court's decision to admit his confession constituted harmless error. The en banc majority erred by not following the same reasoning in the instant case.

The en banc majority relies on Owen v. Alabama, 849 F.2d 536, 540-41 (11th Cir. 1988). The case at bar is readily distinguishable from Owen. First, Owen confessed only once. During his confession his request for an attorney was ignored. Unlike respondent, Owen did not give a second voluntary confession. Second, the cold blooded tenor of Owen's confession far surpassed

respondent's explanation for the shootings. Owen was charged with an intentional killing. Like respondent, he used affirmative defenses (insanity, self-defense) to rebut the question of intent. The Eleventh Circuit held that admission of Owen's confession was not harmless and indeed negated his defense since Owen stated in his confession "[I]f I had a thousand [shells] in there, I would have shot a thousand. Maybe this will teach them a lesson." 849 F.2d at 540. Owen's statement clearly evinced intent to kill. Respondent's statement, on the other hand, "I shot them so they wouldn't get up," does not rise to this level of obvious deliberation and cold blooded malice. Even the Eleventh Circuit, which decided both Martin, supra and Owen, recognized the vast differences in the two scenarios and the inapplicability of Martin. Respondent's case is identical to Martin. The Sixth Circuit thus incorrectly uses Owen as precedent to

reverse a capital case where there has been a second, voluntary confession.

The en banc opinion also erred by holding respondent's confession was not harmless as to the sentencing portion of the trial. According to the majority, the confession was "extremely prejudicial" in the sentencing phase because it omitted reference to drug use and because its tenor was "cold." The majority opinion has again ignored an abundance of evidence in order to seize upon five words. Nothing in the written confession undermined respondent's defense of diminished capacity. Respondent introduced independent and substantive evidence at trial in support of his diminished capacity theory. Again, Judge Kennedy's dissent sets forth the true nature of the evidence:

> The jury was presented with the testimony of several witnesses who observed appellant either immediately before or after the shootings. Terry Hall testified

that appellant arrived at a party at his sister's residence the night before the shootings "in bad condition" with red eyes, slurred speech, and appearing "kind of woozie." Trial Exhibits (TE) 4158, 4164, 4170. Gary Ramell stated that he was "spaced out" and "pretty messed up" at the party. The morning of the murders, approximately seven hours after the party, he awoke and drank two beers and took two Quaaludes, and then took another Quaalude thirty minutes later. Dr. Eljorn Don Nelson, TE 4294-95. Jeffrey Piper testified that he sold appellant ten more Quaaludes about thirty minutes before the shootings. TE 4113. He told the jury that appellant "was very high on Quaaludes," that his speech was slurred, and that his eyes were messed up. TE 4116, 4136. Gary Ramell again testified that about thirty minutes after the shootings he saw appellant and that he appeared "kind of mellow, he didn't seem like he had a care in the world," TE 3791, and that he was glassy-eyed. TE 3806. In his opening statement to the jury, appellant stated that he "shotgunned" two beers the morning of the shootings and took a Quaalude. After stopping to get gas and buy more drugs, he took two more. Appellant also told the jury that when he shot the two men, he was "standing there all messed up from the night before

and what I had already consumed that morning." He told the jury that he "never intended to shoot anybody . . . [i]t just happened." The jury was thus fully aware of the degree of appellant's drug and alcohol consumption at the time of the shootings.

* * *

Admission of the confession did not prevent him from putting before the jury all available evidence of his intoxication due to drugs and alcohol. The evidence supporting diminished capacity was neither contrary to, nor even inconsistent with, the statements made in his written confession. Appellant was as able to put on evidence explaining his mental state when he shot the two men as he would have been had the confession been suppressed. It seems to me logically impossible for the confession to have prejudiced his ability to make his diminished capacity defense.

This is not a situation where appellant sought to suppress a confession containing statements contrary to what he would attempt to prove at trial. For example, if appellant had <u>denied</u> using drugs or alcohol in his confession, the erroneous admission of it would undermine his defense of diminished capacity and

constitute prejudicial error in the manner urged by the majority.

* * *

> Appellant tempered any harshness of his written confession by his direct appeal to the jury in his opening statement and all the substantive evidence at trial showing his drug and alcohol use. Thus his written word was supplemented with an explanation of his mental state when he shot the two men. That the jury did not believe his defense cannot be logically attributed to his confession, a confession that made no reference to drug and alcohol use. Nothing he added at trial to soften the confession's tenor was even slightly inconsistent with or contrary to his written statement. Although I agree that the written confession may have appeared "cold" to the jury, I cannot agree with the majority that it was prejudicial. No juror, given all the evidence of intoxication, could have rejected the evidence out of hand because of the confession's tenor.

(Appendix A-43).

As stated, the en banc majority reversed the judgment of the District Court by a 7 - 6 vote. In his concurring opinion, Judge

Nelson stated "if this had not been a capital case, I would have been quite willing to invoke the harmless error rule." (Appendix A-88). Judge Nelson's refusal to consider the harmless error rule in a capital case, joined by Judge Ryan, is a deviation from this Court's precedent. Most recently in Satterwaite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) this Court applied harmless error analysis in a capital case. See also: Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed. 1 (1972) and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). As stated by the New Jersey Supreme Court in State v. Davis, 561 A.2d 1082 (N.J. 1989), "To judge capital defendants differently would effectively diminish the rights of noncapital defendants, a disquieting result that we reject. There either is a constitutional violation or there is not. There can be no double standards." 561 A.2d at 1089.

Review is essential to correct the Sixth Circuit's refusal to apply Oregon v. Elstad and resolve the conflict between the Eleventh and Sixth Circuit Courts of Appeal. Use of respondent's confession was harmless error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF THE STATES OF ARIZONA, ALABAMA, ALASKA, KANSAS, MAINE, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AMICI CURIAE IN SUPPORT OF PETITIONER

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Questions Presented

1. Did the Sixth Circuit err in applying the Chapman v. California harmless-error test for constitutional error to the erroneous admission of respondent's Miranda-violative confession, where the error in question was nonconstitutional?

2. Is there any basis for a reviewing court to refuse to apply a harmless-error analysis to the erroneous admission of evidence for the sole reason that the case in which it was admitted is a capital case?

3. Should this Court adopt the Stone v. Powell rationale to preclude relitigation of Miranda issues in federal habeas proceedings where a state prisoner had a full and fair opportunity to litigate his Miranda claims in state court?

4. Was the Sixth Circuit in error in determining that respondent's Miranda-violative confession was not harmless error, where the confession should have been admissible to impeach the "testimony" respondent gave to the jurors by way of his opening statement?

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INTEREST OF AMICI

Amici represent the states in numerous federal habeas proceedings initiated by state prisoners pursuant to 28 U.S.C. § 2254. In many of those proceedings, state prisoners raise claims pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), even though such claims were fully and fairly litigated during the proceedings in state court, at either the trial level, or on appeal. Often, the federal courts set aside valid state convictions and order amici to retry state prisoners because Miranda-violative confessions were erroneously admitted at their state court trials. Amici have an interest in obtaining a ruling from this Court applying the rationale of its decision in Stone v. Powell, 428 U.S. 465 (1976), to Miranda claims that are urged as a basis for relief in federal habeas proceedings filed by state prisoners.

Amici prosecute numerous cases in which defendants in state prosecutions allege that

their confessions were obtained in violation of Miranda v. Arizona. Amici have an interest in resolving the use that may be made of such confessions to rebut the self-serving statements that defendants often make at trial, where the statements made at trial are inconsistent with the Miranda-violative confessions. While it is clear that a defendant who testifies inconsistently with his Miranda-violative confession may be impeached with his prior confession, Harris v. New York, 401 U.S. 222 (1971), it is not clear whether Harris would allow such impeachment when the defendant does not actually testify at trial, but is allowed pursuant to a state's procedural rule to present his unsworn testimony to the jurors by way of an opening statement.

Finally, amici have an interest in the Court's determination what standard applies to the erroneous admission of Miranda-violative confessions--the standard set forth by this Court in Chapman v.

California, 386 U.S. 18 (1967), for errors of constitutional dimension, or a standard similar to the one set forth in Kotteakos v. United States, 328 U.S. 750 (1946), for nonconstitutional errors. Further, amici prosecute numerous capital cases, and the Court's resolution of the question whether it is error for reviewing courts to refuse to apply a harmless-error analysis in a capital case will affect those cases.

STATEMENT OF THE CASE

Following respondent's arrest for murder, attempted murder, and robbery, state police officers advised him of his constitutional rights, pursuant to the provisions of Miranda v. Arizona, 384 U.S. 436 (1966). Respondent waived his Miranda rights, and confessed shooting both victims in the head in the course of a robbery. At a later point in the interrogation, respondent indicated several times that he wished to stop the questioning and resume it the next day. The police continued to question respondent, and he subsequently admitted that he shot the two victims in the head so that they would not get up. Respondent signed a written confession in which he admitted his guilt of the murder, attempted murder, and robbery, and in which he admitted shooting the victims so that they would not get up.

Prior to his murder trial, respondent moved to suppress his written confession on

the ground that it had not been voluntarily made. He also claimed that his confession had been obtained in violation of Miranda because the police refused to honor his requests to terminate the interrogation. The state court conducted a suppression hearing. After hearing evidence bearing on the voluntariness and Miranda issues, including respondent's testimony, the trial court denied his motion to suppress his written confession.

At trial, the prosecutor advised the jurors during his opening statement that respondent had confessed to the murder. (It is undisputed that respondent's basic admission that he shot the victims in the head as they lay face down on the floor was made prior to the Miranda violation.) Although respondent was represented by counsel, he gave his own opening statement. Pursuant to Kentucky procedural rule R.Cr. 9.42(b), "the defendant or his attorney may state his defense and the evidence upon

which he relies to support it." In his opening statement, respondent admitted killing the victim, but claimed that he was under the influence of drugs when he did so. The prosecutor introduced respondent's written confession in evidence during the Commonwealth's case-in-chief. Respondent was convicted of murder, attempted murder, and robbery, and he was ultimately sentenced to death for the murder.

Respondent appealed his murder conviction and death sentence to the Kentucky Supreme Court. On appeal, he contended that the trial court erred in allowing the prosecutor to introduce the written confession in evidence, claiming that it was an involuntary confession, and that it had been obtained in violation of Miranda, because the police who interrogated him had failed to honor his requests to terminate the interrogation. The Kentucky Supreme Court held that both of the above claims of error were void of merit, and affirmed

respondent's murder conviction and death sentence.

Respondent then raised his voluntariness and Miranda claims in a federal habeas proceeding. Although the state court had afforded respondent a full and fair evidentiary hearing on those claims, the district court conducted a de novo evidentiary hearing on them. At the conclusion of that hearing, the district court determined that respondent's confession had been voluntarily made, but found that it was obtained in violation of Miranda because the police had not honored his requests to terminate the interrogation. The district court held, however, that the Miranda violation did not require a reversal of respondent's murder conviction or death sentence because admission of the written confession was harmless beyond a reasonable doubt pursuant to Chapman v. California, 386 U.S. 18 (1967).

Respondent appealed the district court's denial of habeas relief to the Sixth Circuit Court of Appeals. A three-member panel of the Sixth Circuit agreed with the district court's determination that admission of the Miranda-violative confession was harmless error. Respondent moved for a rehearing en banc, and the Sixth Circuit granted his request. In an en banc opinion, a divided court held that the Miranda violation was not harmless beyond a reasonable doubt, either at trial or at sentencing. The court vacated the judgment of the district court and remanded the case to that court with instructions to issue the writ of habeas corpus, and to give petitioner time to retry respondent.

Petitioner filed a timely petition for writ of certiorari in this Court, invoking this Court's jurisdiction in this matter. Petitioner contends that the en banc panel of the Sixth Circuit incorrectly determined that the erroneous admission of respondent's

Miranda-violative confession was not harmless error. Amici agree with petitioner that the en banc panel of the Sixth Circuit was in error in overruling the judgments of the district court and the three judge panel of the Sixth Circuit on the harmless-error question, and submit this amici curiae brief for the purpose of presenting other related issues for this Court's consideration.

ARGUMENT

I

THE SIXTH CIRCUIT ERRED IN APPLYING THE CHAPMAN V. CALIFORNIA TEST TO THE ERRONEOUS ADMISSION OF RESPONDENT'S MIRANDA-VIOLATIVE CONFESSION, AS IT SHOULD HAVE APPLIED THE HARMLESS-ERROR TEST FOR NONCONSTITUTIONAL ERRORS TO THE ERROR IN QUESTION.

In 1967, this Court adopted the general rule that a constitutional error does not automatically require reversal of a conviction, if it can be said beyond a reasonable doubt that the error did not contribute to the verdict of guilt. Chapman v. California, 386 U.S. 18

(1967); Harrington v. California, 395 U.S. 250 (1969). However, a nonconstitutional error does not entitle a defendant to a reversal of his conviction unless he can show that such error had a substantial impact upon the verdict, or that he was prejudiced by the error. United States v. Lane, 474 U.S. 438 (1986); United States v. Mechanik, 475 U.S. 66 (1986); see Kotteakos v. United States, 328 U.S. 750 (1946). This Court has recognized that the onerous Chapman standard does not apply to nonconstitutional errors. United States v. Lane, 474 U.S. at 446 n.9.

Although this Court has never specifically held that the erroneous admission of Miranda-violative confessions are subject to a harmless-error analysis, lower courts have uniformly ruled that they are. Howard v. Pung, 862 F.2d 1348, 1351 (8th Cir. 1988), cert. denied, 109 S. Ct. 3247

(1989); United States v. Johnson, 816 F.2d 918, 923 (3rd Cir. 1987); Bryant v. Vose, 785 F.2d 364, 367 (1st Cir.), cert. denied, 477 U.S. 907 (1986); Martin v. Wainwright, 770 F.2d 918, 932 (1985), modified, 781 F.2d 185 (11th Cir.), cert. denied, 479 U.S. 909 (1986); United States v. Ramirez, 710 F.2d 535, 542-43 (9th Cir. 1983); Harryman v. Estelle, 616 F.2d 870, 875 (5th Cir.) (en banc), cert. denied, 449 U.S. 860 (1980). Further, this Court recently remanded a case to the state court for a determination whether the admission of a defendant's statements obtained in violation of Miranda was harmless error. Pennsylvania v. Muniz, 496. U.S. ___, ___, 110 S. Ct. 2638, 2652 n. 22 (1990). Thus, it appears that this Court has at least tacitly acknowledged that a harmless-error analysis is appropriate when a confession that was obtained in violation of Miranda has been erroneously admitted in evidence at trial.

In the present case, the district court, a three-member panel of the Sixth Circuit, and the en banc panel of the Sixth Circuit all applied the Chapman harmless-error analysis to the erroneous admission of respondent's Miranda-violative confession. Application of that rule presupposes that an error of constitutional dimension has occurred. However, a Miranda violation is not an error of constitutional dimension. As this Court stated in Oregon v. Elstad, 470 U.S. 298 (1985):

> The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. Failure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda. Thus, in the individual case, Miranda's

> preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

Elstad, 470 U.S. at 306-07 (footnote omitted) (citations omitted). It is undisputed that respondent did not suffer any identifiable constitutional harm, as the state trial court, the Kentucky Supreme Court, the district court, and a three-member panel of the Sixth Circuit all rejected his contention that his Miranda-violative confession was involuntary.[1] Thus, the Miranda violation should have been subject to the test for nonconstitutional error, rather that to the stringent analysis reserved for error of constitutional dimension. Amici submit that this Court should grant certiorari in this case in order to

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1. The en banc panel of the Sixth Circuit found it unnecessary to address the question whether respondent's written confession was involuntary, since it determined that he was entitled to habeas relief based upon the Miranda violation. (Pet. Appendix at A-16.)

address the question whether a Miranda violation is subject to the stringent Chapman analysis for harmless error, or whether a less stringent harmless-error analysis would be appropriate.

II

THERE IS NO BASIS FOR A REVIEWING COURT TO REFUSE TO APPLY A HARMLESS-ERROR ANALYSIS TO THE ERRONEOUS ADMISSION OF EVIDENCE FOR THE SOLE REASON THAT THE CASE IN WHICH IT WAS ADMITTED IS A CAPITAL CASE.

In overruling the determinations of the district court and a three judge panel of the Sixth Circuit that the erroneous admission of respondent's Miranda-violative confession was harmless error, an en banc panel of the Sixth Circuit held, in a divided opinion, that admission of the confession was not harmless beyond a reasonable doubt. Seven judges joined in the judgment, and six judges dissented. Of the seven judges who joined in the judgment, it appears that two of the judges

erroneously believed that application of the Chapman harmless-error rule to an error committed at trial or at sentencing in a capital case is improper:

> DAVID A. NELSON, Circuit Judge, concurring, joined by Judge RYAN. Like Chief Judge Merritt, I am not satisfied beyond a reasonable doubt that suppression of the tainted portions of the appellant's confession would have made no difference in the vote of any member of the jury. My doubt extends to the jury's resolution of both the question whether the appellant was guilty of premeditation and the question whether he should be sentenced to death.
>
> The untainted evidence against the appellant was very strong, as the dissents of Judges Kennedy and Krupansky persuasively demonstrate, and if this had not been a capital case, I would have been quite willing to invoke the harmless error rule. Death cases can be different for jurors as well as for judges, however, and it seems to me that a jury that wanted to know whether the appellant could be sentenced to life imprisonment without possibility of parole (an option not available under Kentucky law) might very well have settled for life imprisonment with a possibility of parole had it not been for the emotional impact of the appellant's written statement.

(Pet. Appendix A-88)(footnote omitted) (emphasis added). It is apparent from the above language that Judges Nelson and Ryan were unwilling to apply the harmless-error test set forth by this Court in Chapman to the erroneous admission of respondent's Miranda-violative confession simply because this case is a capital case. Or, if they did apply the harmless-error analysis, they placed an additional burden on the Commonwealth of Kentucky to demonstrate harmless error beyond any doubt because the error occurred in the context of a capital case.

Amici submit that Judges Nelson and Ryan erred in refusing to apply the harmless-error rule in this case, as this Court has held in other capital cases that it is appropriate to apply a harmless-error analysis to errors of constitutional dimension that occur in the course of a capital case. Clemons v.

Mississippi, 494 U.S. ___, 110 S. Ct. 1441, 108 L.Ed.2d 725 (1990) (harmless-error rule may be applied by appellate court to uphold death penalty where trial court erred in finding one of two aggravating circumstances); Satterwhite v. Texas, 486 U.S. 249 (1988)(holding Sixth Amendment violation of right to counsel at penalty phase subject to harmless-error analysis, although not harmless as to defendant).

This Court has made it clear in both Clemons and Satterwhite that there is no prohibition to the application of a harmless-error analysis to constitutional errors that occur in a capital case. Since that is true, the two members of the Sixth Circuit en banc panel who refused to apply such an analysis to a nonconstitutional Miranda violation were in error. This Court should grant the petition for writ of certiorari for the purpose of instructing the lower federal

courts that they are required to apply the Chapman analysis, or other appropriate harmless-error test, to the erroneous admission of confessions obtained in violation of Miranda, whether such errors occur in capital cases or in non-capital cases.

III

THIS COURT SHOULD TAKE THIS OPPORTUNITY TO APPLY THE STONE V. POWELL RATIONALE TO PRECLUDE RELITIGATION OF MIRANDA ISSUES IN FEDERAL HABEAS PROCEEDINGS WHERE A STATE PRISONER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS MIRANDA CLAIMS IN STATE COURT.

Respondent murdered the victim in this case and attempted to murder a second victim over eleven years ago by shooting them in the head, execution style, as they lay face down on the floor. After his arrest, respondent was advised of his rights, pursuant to Miranda, and he waived them. He orally confessed his guilt of the murder to the police officers who interrogated him. He

subsequently signed a written confession admitting his guilt.

At respondent's murder trial in state court, he challenged the admissibility of his written confession on the ground that it was involuntary, and on the ground that it was obtained in violation of Miranda. Respondent testified at the evidentiary hearing and contended that he had requested the police to terminate the interrogation, and that they had refused to do so. The trial court, who was in the best position to assess the credibility of both respondent and the officers who had interrogated him, rejected respondent's challenge to the admission of his written confession, and the Commonwealth of Kentucky introduced it in evidence at trial. On appeal, respondent reurged his claims that the confession was involuntary, and that it was inadmissible pursuant to Miranda because the police had not honored his

requests to terminate the interrogation. The Kentucky Supreme Court addressed the merits of the voluntariness and Miranda issues, and held that they were both void of merit.

Having failed to obtain relief in state court on the above claims of error, respondent raised them in a petition for writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. The district court afforded respondent a de novo evidentiary hearing on his voluntariness and Miranda claims. At the conclusion of that hearing, the district court determined that there had been a violation of Miranda because the police had not honored respondent's requests to terminate the interrogation, which he made sometime after his initial admission that he had killed the victim.

Amici request this Court to grant the petition for writ of certiorari in order to squarely address the question whether

Miranda claims are properly cognizable in a federal habeas proceeding, or whether the rationale of Stone v. Powell, 428 U.S. 465 (1976), should apply to bar such claims. Amici contend that Stone v. Powell should apply.

In Stone v. Powell, this Court held that, where a state prisoner had a full and fair opportunity to litigate his Fourth Amendment claim in state court, such a claim would no longer serve as a basis for obtaining federal habeas relief on the ground that illegally obtained evidence was introduced at the state trial. 428 U.S. at 494. In so ruling, this Court recognized that the costs of the exclusionary rule are high, in that it keeps from the jury highly probative evidence bearing on a defendant's guilt or innocence of the crime charged. 428 U.S. at 489-91. Although the Court recognized that the purpose for the exclusionary rule, its deterrent effect,

is served by making illegally-obtained evidence inadmissible in the state's case-in-chief, it recognized that the application of the exclusionary rule to Fourth Amendment violations on federal habeas has no real deterrent effect, and that it violates principles of federalism and finality in the criminal law. 428 U.S. at 492-93. Thus, pursuant to Powell, unless a state court has refused to provide a defendant in a criminal case at least the opportunity to fully and fairly litigate his Fourth Amendment claim, such a claim is no longer cognizable in a federal habeas proceeding. 428 U.S. 494-96.

Amici submit that the rationale for this Court's ruling in Stone v. Powell should be applied to Miranda claims. While a state prisoner should still be allowed to challenge the voluntariness of his confession in a habeas proceeding, since the federal courts review such

claims de novo, Miller v. Fenton, 474 U.S. 104, 110 (1985), there is no valid reason for federal courts to relitigate Miranda claims that have been fully and fairly litigated in state court. As Justice O'Connor noted in her concurring opinion in Duckworth v. Eagan, 492 U.S. ___, 109 S. Ct. 2875 (1989):

> Relitigation of Miranda claims offers little or no additional structural incentive to the police to abide by the dictates of that decision. The awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility of exclusion years after the police conduct at issue will have any appreciable effect on police training or behavior. As Judge Friendly wrote: "The mere failure to administer Miranda warnings . . . creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns." Friendly, Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 163 (1970). On the other hand, the costs of suppression in the federal habeas setting are significantly magnified. As in this case, lower federal courts often sit in "review" of the judgments of the highest courts of

> a state judicial system. This situation has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake. Perhaps most troubling is the cost to society in the efficient enforcement of its criminal laws. Excluding probative evidence years after trial, when a new trial may be a practical impossibility, will often result in the release of an admittedly guilty individual who may pose a continuing threat to society. While federal courts must and do vindicate constitutional values outside the truth seeking function of a criminal trial, where those values are unlikely to be served by the suppression remedy, the result is positively perverse. Exclusion in such a situation teaches not respect for the law, but casts the criminal system as a game, and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns. If Stone v. Powell bars relitigation of allegations of constitutional violations on federal habeas, it seems to me clear that its rationale is directly applicable to relitigation of nonconstitutional claims under Miranda.

492 U.S. at ___, 109 S. Ct. at 2884.

As stated previously, the Miranda violation in the present case was a nonconstitutional error. It was inappropriate for the district court to relitigate respondent's Miranda claim where he had a full and fair opportunity to litigate that issue both at trial and on direct appeal in state court. Although the federal court disagreed with the state court findings of fact in regard to respondent's Miranda claim, it did not determine that there was any doubt regarding his guilt or the probative value or voluntariness of his confession. For the same reasons this Court held in Stone v. Powell that Fourth Amendment claims are not subject to relitigation in a federal habeas proceeding, it should hold that Miranda claims, that do not call into question the voluntariness of a confession, are likewise not subject to relitigation in a federal habeas proceeding.

IV

THE SIXTH CIRCUIT ERRED IN DETERMINING THAT RESPONDENT'S MIRANDA-VIOLATIVE CONFESSION WAS NOT HARMLESS ERROR, AS THE CONFESSION SHOULD HAVE BEEN ADMISSIBLE TO IMPEACH THE "TESTIMONY" RESPONDENT GAVE TO THE JURORS BY WAY OF HIS OPENING STATEMENT.

In Harris v. New York, 401 U.S. 222 (1971), this Court held that a defendant who testifies at trial may be impeached with an inconsistent Miranda-violative confession, even though the state is precluded from introducing such a confession against him in its case-in-chief. As this Court noted in that opinion:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third

> person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Harris v. New York, 401 U.S. at 225-26.

In the present case, respondent did not testify at trial, thus the prosecutor had no opportunity to either cross-examine him, or impeach him with his Miranda-violative confession. However, respondent availed himself of the opportunity provided by Kentucky procedural law to personally give his opening statement to the jurors, rather than to leave that task to his trial counsel. In his opening statement, respondent candidly admitted to the jurors that he had killed the victim. He

then went on to make a number of self-serving statements that were in part inconsistent with his now-determined Miranda-violative confession. For example, respondent never contended in either his oral confession to the police, or in his written confession, that he was under the influence of drugs when he shot the victim. In his statement to the jurors, however, respondent claimed that he had taken so many drugs prior to the shooting that he did not know what he was doing. Thus, while respondent's Miranda-violative confession and his opening statement, or in-court confession, to the jurors were consistent in most regards, they were inconsistent in regard to a fact that bore on the question whether respondent intended to kill the victim when he shot him.

If the trial court had agreed with respondent that his confession to the police was inadmissible because it was

taken in violation of Miranda, the prosecutor would necessarily have been precluded from introducing the written confession in its case-in-chief. However, the prosecutor would have been allowed to introduce in the Commonwealth's case-in-chief respondent's basic confession of guilt, since it was made orally prior to the Miranda violation. The prosecutor would also have been allowed to impeach respondent with his written confession if respondent had testified at trial rather that presenting to the jurors his unsworn testimony in the opening statement. Because it is not permissible to impeach a defendant's opening statement, the prosecutor would have had no way to inform the jurors that the version of the shooting that respondent gave to them in his unsworn testimony was not the same version of the shooting that he had given to the police. In essence, respondent would

have been allowed to pervert "The shield provided by Miranda . . . into a license to use [unsworn] perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Harris, 401 U.S. at 226.

A defendant in a criminal proceeding in the Commonwealth of Kentucky is allowed, pursuant to its procedural rules, to present to the jurors unsworn testimony in the opening statement. When a defendant chooses to do so, and gives a different version of his involvement in the crime to the jurors than the one he gave to police in a Miranda-violative confession, the state should be allowed to introduce the Miranda-violative confession as impeachment evidence. Amici contend that it is a logical extension of the rule set forth by this Court in Harris v. New York to allow such impeachment evidence. To refuse to apply the Harris rule to cover such a situation

is to allow a defendant to avail himself of the benefits of a state's rules of criminal procedure for the purpose of subverting the basic purpose of a criminal trial, which is to determine the truth concerning the guilt or innocence of a defendant. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Extending the Harris rule to such a situation would not prejudice a defendant. He would still be allowed to avail himself of the opportunity to address the jurors by making his own opening statement. Only if he attempted to mislead them, as respondent did in the present case, would the state be allowed to introduce Miranda-violative statements to set the record straight.

The Commonwealth should have been allowed to impeach the claims respondent made in his opening statement, which was tantamount to unsworn trial testimony, with any inconsistent statements that he

had made to the police in his Miranda-violative confession. Since admission of the confession would have been proper for impeachment purposes, its admission was clearly harmless beyond a reasonable doubt under Chapman v. California, or any other harmless-error test.

CONCLUSION

For all the preceding reasons, amici request this Court to grant the petition for writ of certiorari for the purpose of resolving the issues raised in the petition and in this amici curiae brief.

Respectfully submitted,

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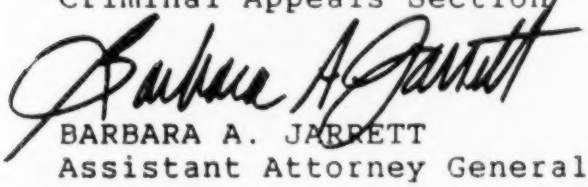

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENE SCROGGY, WARDEN — Petitioner

versus

PAUL KORDENBROCK — Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT PLENARY REVIEW OF THE 6802 PAGE RECORD IN THIS CASE SOLELY BECAUSE PETITIONER DISAGREES WITH THE EN BANC MAJORITY OPINION FINDING THAT THE INTRODUCTION OF THE ILLEGALLY PROCURED CONFESSION WAS NOT HARMLESS UNDER CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967)?

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NO. 90-1293

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENE SCROGGY, WARDEN — Petitioner

versus

PAUL KORDENBROCK — Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Paul Kordenbrock, through counsel, respectfully requests that this Court deny the Petition For Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has stated Amendments V and XIV of the United States Constitution are involved.

Since Petitioner is seeking review of a capital trial and death sentence, Amendment VIII is also involved.

STATEMENT OF THE CASE

The basic facts are not in dispute. At approximately 9:30 a.m., on January 5, 1980, Paul Kordenbrock (Respondent) and Michael Kruse walked into the Western Auto Store in Florence Kentucky, with the intent to take some guns. The two men had agreed to just rob the place -- "no way was anyone to get hurt."

Respondent took the two proprietors of the store to the back and had them lay on the floor. Kruse's attempt to get some guns was interrupted by the unexpected entrance of Jack Webster and his eight year old son. Kruse waited on them, informed them that he could not assist them and, with that, they left.

At that point, Kruse gained access to the guns by breaking the glass case. With that Respondent shot Mr. Thompson and Mr. Allen in the neck from a distance of seven to eight feet. Mr. Allen died immediately. Mr. Thompson survived.

The night before the incident Respondent had arrived at a party at his sister's house "in bad condition." He was "kind of woozie" and he had slurred speech. He also had red eyes. Gary Ramell, one of the revelers, reported that Respondent was "spaced out" and pretty messed up. The party lasted until 1:00 a.m.

Some seven hours later Respondent awoke and drank two beers and ingested two Quaaludes. He took one more Quaalude thirty minutes later.

Jeff Piper testified that he saw Respondent some 30 minutes before the incident. At that time Respondent was "very high on Quaaludes." Respondent's speech was somewhat slurred and his eyes were messed up.

Piper had seen Respondent this way quite a few times for Respondent had purchased "street ludes" from him "almost every day" for the three prior months.

Respondent purchased ten Quaaludes from Piper and drove off toward the Western Auto Store.

Gary Ramell, who had seen Respondent at the party the night before, saw him 30 minutes to an hour after the incident. He testified that Respondent seemed "kind of mellow, he didn't seem like he had a problem in the world" and that he was a "little glassy eye[d]."

Richard Fehler testified that he also saw Respondent shortly after the incident. Respondent seemed to be a little jittery. He was definitely high -- he was "messed up when [he] came here." It seemed to Fehler that Respondent was on Quaaludes. Fehler indicated that this messed up state continued all day culminating in Respondent driving down the Interstate over 100 miles per hour.

Respondent was arrested for the murder at 10:10 p.m., the next day. He was taken to the police station where an intensive interrogation began at 11:34 p.m.

Respondent was swept from his familiar surroundings, placed into tight police custody and was faced with antagonistic forces.

The lead interrogator, Detective Charles Seay, had known the victim for twenty-three years, had sat and talked to him for hours on end, had gone to the same church, knew Mr. Allen's wife, and saw his kids grow up. It is interesting to note that Respondent acknowledged that the person during the interrogation who instilled the most fear in him was Detective Seay.

Over halfway through the interrogation, the interrogators were becoming frustrated with Respondent's reluctance to tell them anything meaningful about the crime. Respondent was reminded at that time by Detective Seay that he did not have to talk and followed up with "I would rather you tell me that you don't want to talk than just sit here." Respondent immediately responded **"Can't talk, right now I can't talk."**

As a seasoned veteran of the Kentucky State Police, Detective Seay knew what that unequivocal statement meant. Yet he pressed on for, as he admitted, he wanted to get the matter wrapped up that night. The interrogation continued.

At that point the interrogators turned up the heat regarding Respondent's girlfriend. They indicated to Respondent that his girlfriend would be arrested unless he gave a full confession. They told Respondent that his girlfriend's "ass is going to jail" unless he confessed. They falsely informed him

that his girlfriend could be kept in jail in Cincinnati for three days without any charges being brought against her. And they reminded Respondent that if he did not confess that his girlfriend would be put through an ordeal that she would not soon forget.

Yet, as all admitted, Respondent was still a most reluctant interrogatee and he refused to give a fuller confession.

Later, Detective Seay informed Respondent that they had arrested Kruse, his co-defendant, with one of the stolen guns and at that point he asked "now what he wanted to tell us." Paul responded **"I told you all that I can stand tonight."** To which the interrogators responded "do you want the girls hassled by the Cincinnati P.D.?" And the interrogation continued.

Eventually the interrogators wanted to start writing Respondent's confession. Yet he was steadfast **"Sir, I can't tell you no more tonight."** To which the interrogators responded, "Yes you can Paul, hey, if you can take it, we can take it."

And the interrogation continued with constant threats to Respondent's girlfriend. Eventually Respondent's resistance was broken down -- "As long as you don't hassle them girls, I'll tell you."

Prior to trial, Respondent moved the trial court to suppress his confession. Despite the fact that he was forced to bargain away his right not to incriminate himself, and in spite of the fact that he unequivocally attempted to cut off

questioning on numerous occasions, the trial court permitted the Commonwealth to introduce Respondent's confession at trial.

In that confession, Respondent made no reference to the use of drugs and contended that he shot the proprietors so they would not get up. He demonstrated no remorse. It basically spelled out a cold, calculated, intentional murder.

Because the trial court ruled that the confession was admissible, Respondent had no choice but to undertake the unenviable task of turning this damning evidence into his favor. In undertaking this task, Respondent let it be known that he was being forced into this position by the erroneous ruling of the trial judge and that his trying to make the best of a bad situation was not a waiver of his objections to that erroneous ruling.

Accordingly, Respondent gave an opening statement admitting the killing but denying it was intentional. This opening was qualitatively different from the cold, callous confession.

Respondent's theory of the case, after the confession was ruled admissible, was to admit the killing but to establish that it was not intentional because of his highly intoxicated state.

The testimony at trial established that Respondent had been on vast quantities of drugs for an extended period. On the morning of the incident he was under the influence of Quaaludes, marijuana and beer.

Dr. Don Nelson, a professor of pharmacology at the University of Cincinnati College of Medicine, testified that as a result of the drugs which Respondent had used on the day of the crimes, he was less likely to do complex planning and to formulate complex thoughts. Respondent was also less likely to appreciate that his conduct was criminal.

Dr. Nelson also testified that considering the amount of drugs which Respondent was on and had been ingesting for quite a while, his mental functions were significantly impaired. That is, his ability to make judgments about his conduct or to meaningfully deliberate higher or ethical moral legal decisions was greatly diminished.

In sum, the drugs which Respondent had been taking were interfering with his ability to reason and diminished his ability to use his brain. According to Dr. Nelson, someone like Respondent would be deemed physically and psychologically addicted to taking drugs. The taking of drugs after such an extended use would no longer be a voluntary act. It had become a disease.

The Commonwealth readily accepted this theory of defense when, in arguing that an instruction should be submitted to the jury on the theory of wanton murder for Respondent's co-defendant, it stated that the "wantonness would certainly be the fact that he went in there with this **guy that he knew to be on drugs.**" That prosecutor further stated "[Kruse] went in there with a guy [Respondent] with a gun that he knew was on drugs, or into jointly rob a store with **some nut like that.**"

Despite the fact that Respondent was not allowed to use supporting testimony from a psychiatrist, the jury still deliberated for seven and a half hours before finding that Respondent intentionally killed Mr. Allen.

The evidence at the penalty phase established that Respondent came from a family of ten children. At the age of thirteen he was taken to a social service agency by his mother because of family difficulties.

There is no doubt that Respondent desired a different relationship with his dad. As was testified to at trial, Respondent indicated that he would have liked to have been closer and to have done more things with his dad. There was no doubt this caused Respondent much emotional turmoil during the most difficult part of his life.

From 1973 until 1975 Respondent served in the Marines. While there, he and his brother-in-law were required to view a rather gruesome incident that stemmed from the inability of one of the Marines to adjust to the pressure of life. According to his brother-in-law, he and Respondent "watched one guy dive off a third story building and we stood there at attention and watched him bleed to death."

While Respondent was never in combat, he was in a battalion landing team which had to be ready for combat at any place in the world within six hours notice. He was honorably discharged from the Marines; unfortunately, **he came home with a severe drinking problem.**

In 1977 another gruesome trauma occurred in Respondent's life -- this time to him. He was so torn up while a passenger in a motorcycle accident (his face smacked into a road sign) that the hospital nurses who took care of him knew him as "the boy without a face." Respondent remained unconscious with a broken jaw for two and one-half days. He spent a month in the hospital recuperating with the assistance of a **heavy amount of drugs**. The accident was so serious that there was some question as to whether or not he would be able to make it. The injury was so extensive that his own sister was unable to recognize him at the time.

His **drug use increased dramatically after this accident**. He was unable to do all of what he had done before and he had a very difficult time coping with that reality; it changed his personality.

His **drug use continued and expanded unabated**. His sister, Angel Kordenbrock, believed that he got heavily involved in drugs in order "to be accepted...to be accepted by his friends, more or less, and to run away from himself." It was clear from everyone who knew him as he was growing up that Respondent could not have done that which he did in the Western Auto Store "if he wasn't on drugs."

Throughout his life Respondent was always a follower, never a leader.

Since Respondent was arrested for these crimes, he **changed "like night and day."** He was **truly sorry** for the pain and anguish he had caused by his actions. As an Episcopalian

Minister testified at trial, "I saw Paul as being **very remorseful** and **hurting very deeply over what he had done**, in sort of a childlike way. Paul had a very difficult time as I perceived it in expressing his hurt, and **I felt his ashamedness.**"

Respondent was also seen as being "pretty humble and kind of quiet" as a result of what he had done. Also as a result of this incident, he developed a "sense of humanity" about himself. Those who knew him well in his childhood testified that Respondent **"wasn't in his right mind when he did it**, most definitely. He couldn't have been in his right mind."

Terry Hall, Respondent's sister, asked the jury not to kill him because "he knows what he did was wrong and he is changing his ways and I would like to see him have a chance to come full circle and maybe make something good out of his life."

Unfortunately, he was sentenced to die. It was a close call for the jury; prior to returning its verdict, it wanted to "know if [it could] recommend a life sentence with no parole?"

After Respondent's direct appeal in state court proved unsuccessful, he filed a writ of habeas corpus in the United States District Court for the Eastern District of Kentucky. That Court and the initial panel of the United States Court of Appeals for the Sixth Circuit found that Respondent's confession was procured in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Yet, those two bodies concluded that the Commonwealth's use of this confession during this case-in-chief was harmless.

The Sixth Circuit, en banc, granted a Petition for Rehearing on the question of whether or not the introduction of

the improperly procured confession was harmless. The majority, like the dissenters, found that the confession was indeed taken in violation of Miranda. However, the majority of the en banc court, after reviewing the massive record in this case, deemed the introduction of the improperly procured confession not to be harmless under Chapman v. California, 386 U.S. 18 (1967) and its progeny. Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990).

As the majority observed in its opinion, in order for the Commonwealth to have proved Respondent guilty of capital murder the Commonwealth had to establish beyond a reasonable doubt that he committed the homicide with the intent to kill. The majority opinion correctly noted that "the most harmful piece of evidence the state had on the issue of his premeditated intent to kill was the unlawfully obtained confession." Id. at 1099. Its introduction also tended to undermine Respondent's claim, that he was under the influence of drugs and alcohol at the time of the shooting and that the shooting was a reflex action."

The majority of the Sixth Circuit correctly concluded that the improperly procured confession not only supplied the only concrete evidence of an essential element of capital murder but it also fatally undermined Respondent's defense of diminished capacity -- "[t]he inadmissible statements in the confession tend to establish premeditation and are hence inconsistent with the impulsive, reactive and reckless behavior associated with events caused by the influence of drugs and alcohol." Id. at 1098.

Petitioner now asks this Court to conduct its own plenary review of the massive record in this case simply because

it feels that the majority's harmless error ruling is wrong. Petitioner is not attacking and could not attack the finding by all who have reviewed this issue in the federal system that the confession was procured in violation of Miranda v. Arizona and Michigan v. Moseley, 423 U.S. 96 (1975).

PETITIONER'S MISSTATEMENTS OF FACT

At the outset, Petitioner uses the most damning part of the illegally procured confession as part of its Statement of the Case to demonstrate that Respondent's actions were intentional. At page 6 of the Petition for Writ of Certiorari Petitioner states that Respondent "fired from a distance of seven to eight feet at both men's heads 'so they wouldn't get up'."

The fact that Respondent has to use this improperly introduced quote to establish the element of intentionality conclusively demonstrates how its introduction could not possibly be harmless under Chapman v. California, supra.

Next, Petitioner did not fully explain the circumstances surrounding Respondent personally giving an opening statement in this case. At the outset, it must be noted that prior to trial the trial court appointed Respondent to be co-counsel in this action. Secondly, under Kentucky Rules of Criminal Procedure (RCr) 9.42(d), a defendant is given a personal right to make an opening statement. That rule reads in pertinent part that "[t]he defendant or his attorney may make his opening statement."

Another misstatement which needs to be corrected is Petitioner's contention that during closing argument

"Respondent's counsel reiterated the confession" (Pet. for Cert. 9). During the closing argument Respondent's counsel actually reminded the jury that Respondent had confessed upon being arrested (after all the confession was introduced over his objection) but he spent the rest of the closing argument, as he did during the entire trial, distancing Respondent from that cold confession. Respondent's defense was that while he may have shot the two men he did not do so with the intent to kill them. Neither Respondent or his counsel "reiterated" that portion of the improperly introduced confession which portrayed him as a cold blooded, intentional murderer.

Also Petitioner leaves this Court with the impression that the decision to reverse Respondent's conviction and sentence was by the narrowest of margins "a 7-6 vote" (Pet. for Cert. 11). However, as this Court can clearly glean from the front cover of the United States Court of Appeals for the Sixth Circuit Opinion in this case, eight members of the en banc panel voted to reverse as to the sentence of death. Judge Norris joined the majority on that point.

Finally, but perhaps most important, Petitioner has misstated Respondent's basic argument. Petitioner is inexplicably contending that Respondent's argument below was that his opening statement was "compelled" and involuntary.

Respondent has neither heretofor nor is he now arguing that the issue in his case is whether he was prejudiced by giving an opening statement. Respondent's argument is simply that the Commonwealth has failed to meet its burden of establishing beyond

a reasonable doubt that its use of Respondent's improperly procured confession as an integral part of its case-in-chief was harmless under Chapman v. California, supra.

REASONS FOR DENYING THE WRIT

A.

SUMMARY OF ARGUMENT

Petitioner is asking this Court to grant plenary review simply because of its contention that the Sixth Circuit erroneously resolved the factual question of whether or not the introduction of the illegally procured confession was harmless under Chapman v. California, supra. Since Petitioner is not arguing that the en banc decision by the Court of Appeals is wrong on the law, and since the Sixth Circuit has carefully and correctly applied the proper harmless error analysis to this massive record, this Court's limited exercise of its certiorari jurisdiction is unwarranted. (The State Transcript of Record contains 1347 pages; the State Transcript of Evidence contains 4824 pages; and the evidence generated in the Federal District Court contains 631 pages.)

B.

PETITIONER'S CONFUSION AS TO RESPONDENT'S ARGUMENT

As noted above, the bulk of Petitioner's pleading prays that this Court undertake its own review of the 6802 page record in this case to determine whether or not the Sixth Circuit's en banc factual resolution of the harmless question was clearly erroneous. The majority of the remainder of Petitioner's

argument is based upon its apparent confusion as to what Respondent has argued throughout the entire review process.

Petitioner states on more than one occasion that "[t]he question in the present case is whether Respondent's personal confession to the jurors during his opening statement was made knowingly and voluntarily." (Pet. for Cert. 15). See also page 13 where Petitioner contends that "Respondent argued he was 'compelled' to confess at trial."

The issue in this case is not whether Respondent was "compelled" to confess at trial; rather, the issue is whether or not the introduction of the improperly procured confession was harmless when viewed in the entire context of Respondent's lengthy trial.

Respondent has never argued that the opening statement prejudiced him. He has merely asserted that because of the tangible and qualitative difference between the opening statements (wherein he pleaded his actions were not intentional and he beseeched the jury for mercy) and the confession (which demonstrated Respondent to be an intentional, cold, calculating and avaricious murderer who is worthy of no sympathy), that Respondent personally giving an opening statement could not be deemed a waiver of his objection to the introduction of the confession.

In resolving whether or not to grant review, this Court should not be mislead by Petitioner's 11th hour case of confusion.

C.

THE SIXTH CIRCUIT DID NOT MISAPPLY CONTROLLING CASELAW

Petitioner contends that the Sixth Circuit's en banc majority opinion "specifically rejects this Court's decision in Oregon v. Elstad, 470 U.S. 298 (1985)." (Pet. for Cert. 13).

The Sixth Circuit did **not** reject this Court's holding in Oregon v. Elstad; rather, the Sixth Circuit correctly rejected Petitioner's argument that Oregon v. Elstad was applicable.

As this Court will remember, in Elstad the question was whether or not a **second** confession procured from an in-custody defendant was tainted by an improperly procured earlier confession. That earlier confession, unlike Respondent's, **had been suppressed** by the trial court. Elstad unsuccessfully argued that his subsequent confession had been tainted by the earlier confession.

Petitioner's Elstad argumentation is inextricably bound in its heretofore mentioned confusion as to what Respondent is actually arguing. If indeed Respondent was arguing that the error committed in this case was the improper compelling of his opening statement, then Oregon v. Elstad might have some applicability. However, that argument has not been raised and is not before this Court.

Again, the issue is whether or not the introduction and use by the state in its case-in-chief of Respondent's improperly procured confession was harmless under this Court's well-established Chapman standard. Elstad is not a harmless error case. It simply is a case which gives lower courts guidance on

how to resolve questions of whether or not an improperly procured confession later taints any further confessions taken from an in-custody defendant.

D.

THE SIXTH CIRCUIT'S OPINION HAS NOT CREATED A CONFLICT WITH THE 11TH CIRCUIT

Oregon v. Elstad, supra, was applicable to the 11th Circuit's determination as to whether or not subsequently procured confessions were tainted by an initial improperly obtained confession in Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985) (modified on other grounds in 781 F.2d 185 (11th Cir. 1986), Cert denied, 479 U.S. 909 (1986). However, neither Elstad nor the rationale of the 11th Circuit in applying Elstad is applicable herein given the reality that the initially procured confession was introduced and used against Respondent and no argument is being made that a subsequent confession was inadmissible as the result of the taint of that first confession.

In Martin v. Wainwright, supra, the 11th Circuit did have before it the question of whether or not the introduction of the improperly procured initial confession was harmless under Chapman. The 11th Circuit, after reviewing the entire record in the case, concluded that the error was harmless because Martin had given a "far more detailed description of the murder" in a subsequent confession which had been ruled admissible under an Elstad analysis.

Unlike the confession of Respondent, the improperly admitted confession in Martin had merely indicated that he had

killed the victim. Furthermore, the 11th Circuit noted that in addition to the admissible confession:

> The jury had before it the testimony of Martin's accomplice, Gary Forbes, who gave a lengthy account of the robbery, kidnapping, and sexual battery of Patricia Greenfield, and who told the jury how Martin, armed with a knife, lead the blindfolded young woman down a dirt road at Lantana Dump and returned fifteen or twenty minutes later, saying that he had killed Greenfield by stabbing her in the throat. Finally, the jury was presented with the unrebutted testimony of a state pathologist, who examined Greenfield's body and found the cause of her death to be the multiple stab wounds in the throat. Id. at 933.

Since the Sixth Circuit's harmless error analysis in this case was the same as the 11th Circuit's in Martin, there is not a conflict between the two decisions. The 11th Circuit had a markedly different fact situation before it in conducting its Chapman analysis.

An 11th Circuit case closer on point is Owen v. State of Alabama, 849 F.2d 536 (11th Cir. 1988). In that case the 11th Circuit had before it a case where an on-duty uniformed police officer was murdered by two blasts from a shotgun at the scene of a traffic stop. (Id. at 537). A confession was procured from Owen in violation of Miranda.

At trial Owen raised a diminished capacity defense (insanity) wherein he presented psychiatric testimony (which Respondent was estopped from doing in this case). The psychiatrist was required to relate to the jury the details of

the shooting as explained to him by Owen. Furthermore, Owen's ex-wife also testified that Owen had telephoned her on the night of the shooting and had given her details as to the circumstances of the killing.

As in this case, the state had argued that the intent to kill "was evident from the facts of the crime and the cold blooded method in which the killing was carried out." In rejecting this argumentation, the 11th Circuit stated:

> Assuming arguendo that the intent to kill can be inferred from the nature of a crime, we cannot say that the admission of Owen's police confession did not contribute to his conviction. Since the police confession was the only direct evidence of intent, it is likely that the admission of that statement prejudiced Owen. Id. at 541 fn. 2.

The Court concluded that since the improperly introduced confession suggested "that he had an intent to kill and that he understood what he had done," its admission was not harmless error because it contradicted his diminished capacity defense.

Contrary to Petitioner's contention, Owen is more directly on point than Martin. But the bottom line is that in both instances the 11th Circuit undertook the appropriate Chapman analysis in concluding that Owen was entitled to relief but Martin was not. Likewise, the Sixth Circuit has undertaken the proper Chapman analysis in this case and after its review of the entire, lengthy record, its conclusion regarding harmlessness is unassailable.

Before passing, it is important to note that the 11th Circuit has recognized that in harmless error jurisprudence "the admission of an unlawfully obtained confession rarely is 'harmless error'...[b]ecause confessions carry 'extreme probative weight.'" Christopher v. Florida, 824 F.2d 836, 846 (11th Cir. 1987).

One final note: The dissenters in the Sixth Circuit did **not** rely on Oregon v. Elstad as providing a basis for undermining the majority's opinion. For that matter, Oregon v. Elstad was **not even mentioned** by the dissent.

E.

THE SIXTH CIRCUIT DID NOT IGNORE ONE OF ITS OWN PRIOR DECISIONS

Petitioner contends that the en banc majority has ignored its own precedent -- Burks v. Perini, No. 85-3507 (6th Cir. November 25, 1986) (unpublished opinion).

At the outset, Burks v. Perini was fully discussed and argued before the en banc panel in the Sixth Circuit. Secondly, the majority opinion specifically addressed the District Court's reliance on Burks v. Perini, and correctly found that reliance to be "misplaced." Kordenbrock v. Scroggy, supra at 1099. Thus, it strains credulity to argue that the Sixth Circuit has ignored its own precedent.

Before passing, it is important to note that Burks was an unpublished opinion of the Sixth Circuit which, by very definition, means that it was not worthy of full text publication. See generally Rule 24(a) of the Sixth Circuit Court

of Appeals -- Criteria for Publication. See also Subsection c of that Rule where the Sixth Circuit has indicated that the use of unpublished opinions "is disfavored."

Before passing, again it is important to note that the dissent in the Sixth Circuit panel did not make a meaningful attempt to show that Burks v. Perini controlled the outcome of this case. The reason for that is evident when one realizes the factual distinctions between both cases.

In Burks, the defendant admitted an **intentional** killing, but contended he acted in self-defense. In effect, that case presented the jury with a true black and white factual issue. The defendant in Burks stated that I committed the crime, I did it intentionally, but I am entitled to an acquittal because of self-protection. Unlike Respondent, **Burks did not rely on a diminished capacity defense** since there was no evidence of alcohol or drug intoxication.

The facts as introduced against Burks totally belied his theory of self-protection. At trial, an eyewitness "testified that Burks, without provocation, shot Fletcher in the stomach and then shot him in the back as he was running toward the bar." Furthermore, two admissions of guilt were given by Burks prior to the Miranda violation in that case. In that context, it was understandable why the Sixth Circuit panel concluded, in this unpublished opinion, that the improper introduction of Burks confession was harmless under Chapman.

F.

TWO JUDGES DID NOT REFUSE TO APPLY HARMLESS ERROR ANALYSIS

Petitioner pounces upon some loose language in Judge Nelson's concurring opinion to argue that he and Judge Ryan refused "to consider the harmless error rule in a capital case." (Pet. for Cert 29).

At the outset, Judge Ryan stated unequivocally that the reason he could not vote to affirm was because he was "unable to say, beyond a reasonable doubt, that the unlawfully admitted confession did not contribute to the verdict and subsequent death sentence in this case." Kordenbrock v. Scroggy, supra, at 1135. Judge Ryan reasoned as follows:

> The illegally admitted confession is not only an explicit and damning admission of the killing, it is, by its language, tone and content, as well as the absence of any claim of diminished capacity or uncertainty of purpose, powerful circumstantial proof of the clear headed intention to execute both victims. It is a complete and unqualified confession of premeditated murder, strikingly inconsistent with the defendant's courtroom claim of diminished capacity. As such, it is the most powerful, although not the sole, evidence in the record of defendant's malice and premeditation. Id.

Finally, in total refutation of Petitioner's claim that he refused to apply the harmless error standard in a capital case, Judge Ryan stated "I cannot say, beyond a reasonable doubt,

that such evidence did not 'contribute to the verdict'. Chapman v. California, 386 U.S. 18, 23 (1967)." (Id. at 1135-1136).

A careful and correct reading of Judge Nelson's opinion demonstrates that he was not rejecting the harmless error analysis in a death penalty case; rather, he was reflecting the now well established reality in death penalty jurisprudence that "[d]eath cases can be different for jurors as well as for judges." Id. at 1133. Judge Nelson, in undertaking his harmless error analysis, clearly took into consideration the oft quoted maxim that the "qualitative difference of death...requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-999 (1983). It also must be noted that Judge Nelson specifically "concur[red] in the conclusions" by the majority that the improper use of the confession was not harmless under Chapman v. California, supra. (Id.).

G.

THIS COURT HAS ESTABLISHED CLEAR AND BRIGHTLINE BOUNDARIES FOR DEFINING MIRANDA AND FIFTH AMENDMENT VIOLATIONS

Petitioner asserts, without explaining why, that review by this Court is "essential to clarifying the boundaries of the Fifth Amendment when a technical Miranda violation occurs." (Pet. for Cert 12). The fact that such assertion is unsupported is understandable: This Court has consistently given clear and brightline boundaries as to what interrogators can do when an in-custody citizen expresses a desire to cease interrogation. See Miranda v. Arizona, supra and Michigan v. Moseley, supra.

As this Court recognized in Miranda, just giving a defendant the "warnings" will not suffice for after that, "[i]f the individual indicates **in any manner**, at any time prior to or **during questioning, that he wishes to remain silent, the interrogation must cease.** Id. at 473-474. This Court recognized that "[w]ithout the right to cut off questioning, the setting of an in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked." Id. at 474.

This Court had occasion subsequent to Miranda to clearly define what the "right to cut off questioning" meant. As it recognized in Michigan v. Moseley, supra, when a defendant exercises "his option to terminate questioning **he can control the time at which questioning occurs**, the subjects discussed, **and the duration of the interrogation.**" Law enforcement officers are mandated to "scrupulously honor" a defendant's invocation of his right to control the time and duration of the interrogation.

Nothing subsequent to the decisions in Miranda and Michigan v. Moseley have clouded the clear guidelines found in those two cases. For that matter, this Court recently reaffirmed its dedication to the bright line principles espoused in Miranda in a closely analogous situation where a defendant has exercised his right to counsel during an interrogation. See Minnick v. Mississippi, _____ U.S. _____, 111 S.Ct. Rptr. 486 (1990).

H.

THE SIXTH CIRCUIT'S DECISION WAS CORRECT

When all of the wheat is removed from the chaff, it is clear that Petitioner is protesting that the Sixth Circuit decided this case incorrectly. However, Petitioner has not demonstrated how and why the majority's opinion was incorrect. It just contends that the dissenting opinion was more correct.

It is understandable why Petitioner fails to take a frontal assault on a majority opinion. Chief Judge Merritt's harmless error analysis is unassailable.

In undertaking this harmless error analysis, the Chief Judge was correct to state that such an "inquiry is fact specific and requires an analysis of the particular facts at hand" Id.

In undertaking this inquiry, the Chief Judge initially and correctly noted that "the portion of [Respondent's] confession taken after the Miranda violation -- other than the inferences to be made from the fact the robbery and shooting -- **was the only concrete, non-circumstantial piece of evidence the state had to prove the premeditation element of the crime.**" In demonstrating the impact that the improper introduction of this confession had on the jury the Chief Judge made the following comments:

> Both as an element of the offense and as a reason for imposing the death penalty, the state attempted to prove that [Respondent] consciously formed an intent to kill independently and uninfluenced by any effects drugs and alcohol may have had on his mental and emotional state. Logically a juror could easily reason that the inadmissible

> statement that [Respondent] fired "at their heads so that they wouldn't get up" implies a mental process of deliberation and forethought sufficient to exclude drugs and alcohol as an immediate or direct cause of the homicide. Id. at 1097-1098.

The Chief Judge correctly pointed out that the defense of diminished capacity presented by Respondent turned on what the juror felt was his reasons for killing: Was it his conscious intent to do so or was it the direct but unintentional result of the influence of drugs of alcohol? Since the inadmissible statements in the confession tended to establish premeditation and were "inconsistent with the impulsive, reactive and reckless behavior associated with events caused by the influence of drugs and alcohol", its introduction could not have been harmless as to both guilt and innocence and as to sentencing. Id. at 1098-1100.

As to the question of whether the improper introduction was harmless at sentencing, the Chief Judge pointed out that it was clear from the record that the jury was struggling with its decision as to what punishment to impose. "Indeed, after some deliberation the jury asked if they could sentence [Respondent] to life without parole indicating an interest in imposing the harshest possible sentence short of death." Id. at 1098.

Again it must be noted that Petitioner has really not taken on Chief Judge Merritt's harmless error analysis in this case. Rather, it indicates that the dissenter's opinion, after reviewing the same extensive evidence, came to the more correct resolution. Instead of arguing how this was more correct,

Petitioner merely quotes the dissenter's harmless error analysis.

While it is true that the dissenting opinion came to a different conclusion, it cannot go without noting that that particular opinion failed to take into consideration the most important testimony which was introduced in Respondent's defense during the trial. Dr. Don Nelson, a Professor of Pharmacology at the University of Cincinnati College of Medicine, testified that as a result of the drugs which Respondent had used on the day of the crimes, he was less likely to do complex planning and to formulate complex thoughts. In effect, the drugs that Respondent was taking were interfering with his ability to reason and were diminishing his capacity to carry out purposeful and intentional acts.

By the dissenting opinion's failure to mention Dr. Nelson's testimony vis-a-vis Respondent's defense of diminished capacity in its harmless error analysis, it fails to give adequate weight to the strength of his defense and to the eviscerating effect that the improperly introduced confession had on that defense.

Before passing it is important to note that while the dissenting opinion ignored Dr. Nelson's testimony when undertaking its harmless error analysis regarding the confession, the dissent did use Dr. Nelson to show that Respondent was not harmed by failing to have the testimony of a psychiatrist (Dr. Nizny) at the trial.

Respondent argued below that he had been thwarted in his attempts to put on the testimony of Dr. Nizny in support of

Respondent's theory of defense. Dr. Nizny would have testified that Respondent was mentally ill and emotionally disturbed at the time of the incident. Dr. Nizny would also have been able to testify that Respondent did not have the intention to end anyone's life.

In rejecting Respondent's argument (the dissent was actually the majority on this issue below), the dissent concluded that Respondent's constitutional rights under Ake v. Oklahoma, 470 U.S. 68 (1985) "were adequately protected by the testimony of Dr. Eljorn Don Nelson", Kordenbrock v. Scroggy, supra at 1119. The dissent's conclusion was based on its finding that Dr. Nelson's testimony was "sufficient to establish the defense of diminished responsibility and mental capacity." Id. at 1120.

The absence of any discussion of the impact that the improper confession had on the testimony of this most important witness fatally undermines Petitioner's contention that the dissenting opinion was more correct in the harmless error analysis.

Petitioner had his day in court in the Sixth Circuit. The issue was fully briefed and competently argued by both sides. The Sixth Circuit reviewed the entire record in this case and concluded, contrary to Petitioner's position, but consistent with the applicable law governing confessions and harmless error, that the complained of error was prejudicial to Respondent.

Now Petitioner is beseeching this Court to undertake a similar review of the voluminous record in this case in hopes that this Court will reach a contrary finding. In the absence of

any real or perceived misapplication of constitutional law, this Court is, in essence, being asked to substitute its judgment for the en banc panel of the Sixth Circuit Court of Appeals.

Institutionally this Court is simply not set up to undertake such a task. If it granted cert in situations where a Petitioner simply contends that a reviewing court's factual resolution of the properly applied harmless error standard is incorrect, then this Court would be mandated to review every record which contained a constitutional error no matter the size of that record -- even if its 6802 pages as found in this case.

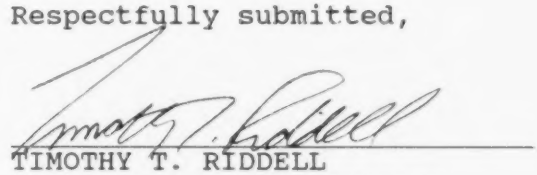
This Court's limited time is precious. There are too many important constitutional issues that need to be resolved. Undertaking harmless error analysis in cases such as this where there has been no challenge as to the appropriateness of the applicability of the constitutional rules would be a travesty of justice for those litigants who have legitimate claims for this Court to hear and resolve.

CONCLUSION

Petitioner has asserted no special and specific reasons why this Court should grant a writ in this case. The Sixth Circuit correctly applied the applicable controlling decisions. The Court's decision did not create a conflict with the 11th Circuit; rather, both circuits approach to the clear guidelines that this Court has laid down in regard to Miranda and Chapman are consistent. The en banc Sixth Circuit fully addressed and found to be inapplicable a non-published prior opinion by one of its panels. Judge Ryan clearly used the Chapman standard and

Judge Nelson's harmless error analysis is reflective of the qualitative difference of death cases. Miranda and Michigan v. Moseley set out in unequivocal fashion the procedures which interrogators must follow and what they can and cannot do once a defendant exercises his control over the timing and duration of in-custody interrogation. Finally, the Sixth Circuit's factual resolution of the properly applied harmless error standard is not clearly erroneous.

Respectfully submitted,



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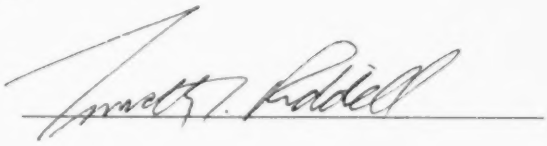
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed via United States Postal Service, first class, postage prepaid on this 21st day of March, 1991, to the Honorable Michael Harned and the Honorable Carroll Ullerich, Assistant Attorneys General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.



EDITOR'S NOTE:

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90-1293

NO. 90-

SUPREME COURT, U.S.
FILED
FEB 19 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENE SCROGGY, WARDEN — Petitioner

versus

PAUL KORDENBROCK — Respondent

PETITIONER'S APPENDIX

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APPENDIX

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Opinion (Ten complete copies have been lodged with this Court, pertinent parts are reproduced herein), United States District Court for the Eastern District of Kentucky, February 16, 1988	A-130 - A-154
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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 88-5467/89-5107

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL KORDENBROCK,
Plaintiff-Appellant,

v.

GENE SCROGGY, Warden,
Kentucky State Penitentiary, *et al.*,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Kentucky

Decided and Filed November 21, 1990

Before: MERRITT, Chief Judge, KEITH, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS, and NORRIS, Circuit Judges.

MERRITT, Chief Judge, announced the judgment of the Court in part VIII granting the Writ of Habeas Corpus as to both criminal liability and sentence, a judgment in which seven of the thirteen members of the *en banc* Court concur (Judges MERRITT, KEITH, MARTIN, JONES, MILBURN, NELSON, and RYAN), and in which one member concurs as to the sentence (Judge NORRIS).

Chief Judge MERRITT delivered an opinion in which Judge KEITH concurs in all parts, Judge KENNEDY concurs in part V, Judge MARTIN concurs in parts I through IV and VI and VII, Judge JONES concurs in all parts, Judge KRUPANSKY concurs in part V, Judge WELLFORD concurs in part V, Judge MILBURN concurs in parts I through V, Judge GUY concurs in part V, Judges NELSON and RYAN concur in part V and the conclusions announced in parts II and III, Judge BOGGS concurs in part V, Judge NORRIS concurs in parts I, IV, and V and the conclusions announced in part II. Judges KENNEDY (pp. 37-60), MARTIN (pp. 61-67), KRUPANSKY (pp. 68-83), WELLFORD (pp. 84-86) and GUY (pp. 87) delivered separate opinions concurring in part and dissenting in part. Judges NELSON (pp. 88-92) and RYAN (pp. 93-94) delivered separate opinions concurring in the judgment and in the conclusions announced in parts II and III of Chief Judge MERRITT's opinion. With respect to Judge KENNEDY's opinion, Judges KRUPANSKY, GUY and BOGGS concur in all parts; Judge MILBURN concurs in parts III and IV; Judges NELSON and RYAN concur in part IV, Judge WELLFORD concurs in parts I, II, and IV; and Judge NORRIS concurs in Parts I, III and IV.

* * *

As in many death penalty, habeas corpus cases, the problem presented here is not whether the prisoner is innocent of a homicide -- the killing is conceded -- but rather whether he received the full benefit of fair rules of constitutional procedure and a fair opportunity to offer to the jury mitigating circumstances that might dissuade them from imposing a sentence of death.

It is not the Court's duty to determine whether Kordenbrock deserves or does not deserve the death sentence for his crime. The Court's duty is to insist upon the observance of constitutional norms of procedure. The District Court, and the panel decision of our Court which has now been vacated by the grant of *en banc* review (*see*

6th Cir. R. 14), held that petitioner was not entitled to habeas relief. Because a majority of the *en banc* Court finds that the introduction and use of Kordenbrock's confession was in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and was not harmless error, we now reverse.

I. Facts

Petitioner Kordenbrock and co-defendant Michael Kruse agreed to steal guns from an auto parts store in Florence, Kentucky. For two days before the robbery, they visited the store to observe the layout. The night before the robbery they stayed with a friend in Cincinnati where they drank alcohol, smoked marijuana, and snorted cocaine. The next morning at 8:00 Kordenbrock drank two beers and took two Quaaludes.

After leaving the apartment, the two stopped to buy more Quaaludes. From there they proceeded to the auto parts store and arrived around 9:30 a.m. Kordenbrock, who was holding a gun, ordered the owner of the store, Mr. Thompson, and an employee, Mr. Allen, to lie face down on the floor in the back of the store. Just then a customer came in with his son. Kruse pretended he was an employee and told the customer the store did not have what he wanted.

Kruse then broke the glass gun case. Immediately following that Mr. Allen either moved or attempted to get up. Petitioner shot both men. Mr. Allen later died, but Mr. Thompson survived. When Kruse had assembled the guns the two left the store.

They stopped at two different places to sell some of the guns. One of the men to whom they sold the guns recognized Kordenbrock's picture which appeared on the local news and cooperated with police in bringing about his arrest. Upon his arrival at the police station a group of police began to question him after giving him *Miranda*

warnings. The interrogation began around 11:30 p.m. Joint App. at 1057; *see also id.* at 71-110.

A. The *Miranda* Warnings Violation

From the beginning of the interrogation, Kordenbrock was reluctant to talk with police, repeating the phrase, "I don't know what to say." *Id.* at 72, 75, 80. The officers, who already suspected that Kordenbrock had shot the two men, encouraged him repeatedly to relate details of the crime, saying, "you've got a conscience Paul." *Id.* at 73, 82, 83. After further coaxing petitioner admitted some aspects of the crime such as what type of car he drove the day of the shooting and where he had disposed of the gun.

In an effort to persuade Kordenbrock to give them more details of the actual shooting, the officers threatened him, saying that if he would not cooperate they were going to "book that girl[1]. . . . for accessory to murder . . . and put her in jail." *Id.* at 86. The officers continued: "Anybody that you have been with since yesterday morning, we can go out and arrest." *Id.* at 87. Still he resisted questioning, and indicated he wanted the questioning to stop: "I can't say nothing," *id.* at 91, "[c]an't talk, right now I can't talk." *Id.* at 92. Instead of ceasing questioning, the officers continued with their threats: "Their ass is going to jail . . . . [I]n Ohio, they can keep them in jail for about three days without even charging them. . . . they're going to be put through an ordeal they may not forget for a long time Paul and you can stop it, right now. . . ." *Id.* at 93.

After these threats, Kordenbrock stated: "I did it. . . . [t]hat's all I can tell you is that I did it." *Id.* at 94. He then asked to call the girls to see if they were all right and wanted "to know that those girls aren't going to be arrested" before he gave any more details. *Id.* However, when pressed further Kordenbrock made another attempt

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[1]Abigail Smith, with whom Kordenbrock had stayed the night before the shooting, was with Kordenbrock when he was arrested.

to cut off questioning: "I told you all I can stand tonight . . . . Sir, I can't talk about it no more tonight." *Id.* at 98. When the officers told petitioner they were going to write out his confession as he dictated it, he again responded: "Sir, I can't tell you no more tonight." *Id.* at 100. The officers, growing impatient, gave him "one more chance," *id.*, and he finally gave in: "I'll tell you what you need to know, I don't want you to go bother them girls. . . ." *Id.* at 101.

Only then did Kordenbrock make the damning statements that undermined his defense of diminished capacity. The officer who was transcribing the statement said, "Paul, what I'm going to write here is - I, Paul Kordenbrock pulled the trigger aiming and firing the weapon into the two men's heads - is that correct?" *Id.* at 105. That statement was included in the signed confession. The confession did not include the statements made during the interrogation that his "eyes were half closed," and that he didn't aim at any particular spot. Apparently, in order to get the ordeal over with, he told the officers to "[p]ut [the fact that he aimed at their heads] in there." *Id.* The confession edited out facts that might support a defense of lack of premeditation and diminished capacity and simply read, "I then, Paul Kordenbrock, pulled the trigger, aiming and firing at their heads so they wouldn't get up." *Id.* at 112.

B. The State's Refusal to Provide a Psychiatric Expert for the Defense

Kordenbrock pled guilty to first degree robbery and was then tried for capital murder and attempted murder. His defense was diminished capacity due to drugs and alcohol and emotional disturbance.[2] His lawyers, employed by the Office for Public Advocacy of the State of Kentucky,

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[2]Two of Kentucky's statutory mitigating circumstances are as follows:

> The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or

sought to enlist the aid of a psychiatrist to help prove these and other mitigating factors. At the request of the trial judge, one of Kordenbrock's lawyers wrote to the Secretary of the Department of Human Resources to ascertain whether a state psychiatrist could perform this service. Joint App. at 161. The Secretary responded by letter that Department psychiatrists could only evaluate criminal defendants for their competency to stand trial and for the existence of mental disease or defect at the time the crime took place. The letter stated: "These evaluations are provided pursuant to court order and are supplied as a service to the court, and not to either the prosecution or the defense." *Id.* at 162. The Secretary characterized these evaluations as "objective" and "determined that this Department will not be able to assist you with your request." *Id.*

This letter made it clear that a state psychiatrist could not be used as a defense expert. The trial judge then entered an order stating that defense counsel could employ at state expense a psychiatrist, psychologist and a psychopharmacologist. *Id.* at 59. When the chief executive officer of the county in which the trial was to be held received the order, he refused to authorize payment: "The Boone County Fiscal Court will resist by all appropriate means the payment of any bill relative to the KORDENBROCK . . . . murder trial[ ]." *Id.* at 170. Apparently the county took the position that the state should pay for a defense expert, but the state had already

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emotional disturbance is not sufficient to constitute a defense to the crime. . . .

Ky. Rev. Stat. Ann. § 532.025(2)(b)(2) (Baldwin Supp. 1989).

At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime. . . .

Ky. Rev. Stat. Ann. § 532.025(2)(b)(7) (Baldwin Supp. 1989).

refused, and continued to refuse, to pay for a psychiatric expert for the defendant.

Despite the fact that responsibility for payment was in dispute, defense counsel hired Dr. Nizny as a defense expert. Dr. Nizny examined Kordenbrock and made a report on his diagnosis and assessment of petitioner. However, Dr. Nizny, who was aware of problems other psychiatrists had encountered getting paid, refused to file his report until he received some sort of assurance that payment would be forthcoming. Once again the trial judge ordered the county to pay Dr. Nizny's fees. When the county continued to refuse payment, the trial court, over defense counsel's objection, ordered that petitioner be examined by a state psychiatrist. In response, the Director of Forensic Psychiatry Services wrote that "we will not be able to assist only the defense in this case. I will inform Judge Neace of our services to both the defense and the prosecution." *Id.* at 165. Despite this letter, the trial judge again ordered that a state psychiatrist examine petitioner.

Dr. Bland, a state psychiatrist, met with Kordenbrock, but could not form an accurate opinion because Kordenbrock's lawyers had told him not to cooperate with Dr Bland. One of Kordenbrock's lawyers stated that his reason for instructing petitioner in that manner was that he met with Dr. Bland and the doctor "indicated that he could not examine Paul as our defense psychiatrist because of the Secretary's directive." Joint App. at 166.

In the meantime defense counsel had located a forensic psychiatrist who was willing to examine Kordenbrock without an unqualified guarantee to payment. Defense counsel filed a motion for a continuance for the new doctor to have time to prepare a report. However, due to a misunderstanding between the doctor and counsel, the doctor withdrew from the case. Apparently defense counsel, now without a suitable expert, asked the trial judge for a continuance to locate another expert, or alternatively another order on the issue of payment for

Dr. Nizny. The judge refused the continuance and refused to enter an order for payment until Dr. Nizny filed his report. The trial proceeded without a defense expert.

Kordenbrock was found guilty of murder and attempted murder. The jury recommended that he be sentenced to death. He appealed to the Kentucky Supreme Court asserting 29 possible errors, none of which the court found to have merit. *Kordenbrock v. Commonwealth*, 700 S.W.2d 384 (Ky. 1985), *cert. denied*, 476 U.S. 1153 (1986).

He next sought habeas relief before the District Court in Kentucky. The District Court held an evidentiary hearing both on the voluntariness of Kordenbrock's confession and on the issue of his entitlement to a psychiatrist. Although the District Court found that the confession was taken in violation of his *Miranda* rights, the Court held that the introduction of the confession was harmless error. The District Court denied relief on all of the 23 grounds alleged. *Kordenbrock v. Scroggy*, 680 F. Supp. 867 (E.D. Ky. 1988). A panel of this Court affirmed the District Court's findings. *Kordenbrock v. Scroggy*, 889 F.2d 69 (6th Cir. 1989). The suggestion for rehearing *en banc* was granted. *Kordenbrock v. Scroggy*, 896 F.2d 1457 (6th Cir. 1990).

II. Use of Confession at Sentencing

During the interrogation Kordenbrock repeatedly stated: "I can't tell you no more tonight." Despite this attempt to stop questioning, the interrogation continued. When asked by the District Court Judge whether he interpreted that statement to mean that the accused wanted questioning to cease, Detective Stamper responded disingenuously, "No, I never drew that kind of conclusion whatsoever from the conversation we were having . . . ." Joint App. at 1068. Both the District Court and a panel of this Court found that the confession was taken in violation of *Miranda*. *Kordenbrock*, 889 F.2d at 78. The

state appears to concede this point based on *Michigan v. Mosley*, 423 U.S. 96 (1975), in which the Supreme Court stated that the "right to cut off questioning" must be "scrupulously honored," and that after an accused has invoked his right to silence the police may not "persist[] in repeated efforts to wear down his resistance and make him change his mind." *Id.* at 104-06. Both the Court below and the panel of this Court, however, found admission of the confession to be harmless error. *Kordenbrock*, 889 F.2d at 80.

Although it is true that "[t]he basic admission of guilt [of the killing] was . . . not obtained in violation of *Miranda*," *id.* at 78, Kordenbrock made, and the confession recites, extremely prejudicial and incriminating statements made after the interrogation should have ceased. There is no argument that the entire interrogation is inadmissible. He concedes that he committed the homicide. It is the statements concerning the shooting itself which he sought to suppress. His defense to murder was to admit to the jury from the outset of the trial that he had killed the store employee, but that he had done so while under the influence of drugs and alcohol. The statements recited in the confession as made during the interrogation were cold and calculating, made no reference to his drug use, and tended to show Kordenbrock in the worst possible light.

Thus the question is whether the admission of the statements during the guilt phase, and their readmission during the sentencing phase, were harmless error. We deal with the sentencing phase first. In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court formulated the harmless error rule in cases where constitutional violations have occurred. Although the Court declined to adopt a rule which would require reversal in all cases where errors of constitutional magnitude occurred, it adopted a stringent harmless error standard. The Court required the "beneficiary of a constitutional error [the state] to prove *beyond a reasonable doubt* that the error complained of did not

contribute to the verdict obtained." *Id.* at 24 (emphasis added).

The Supreme Court recently affirmed that the *Chapman* harmless error standard applies to errors during the sentencing phase of a capital case: "The question...is not whether the illegally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State had proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)(quoting *Chapman*, 386 U.S. at. 24).

The harmless error inquiry is fact specific and requires an analysis of the particular facts at hand. In this case the portion of Kordenbrock's confession taken after the *Miranda* violation -- other than the inferences to be made from the fact of the robbery and shooting -- was the only concrete, noncircumstantial piece of evidence the state had to prove the premeditation element of the crime. It tended to undermine at the sentencing hearing the claimed mitigating circumstances of diminished capacity due to the use of drugs and alcohol. The Court must entertain with an open mind the possibility that at least one member of the jury took the language of the confession seriously and relied on the harshness of its description to tip the balance in favor of the death penalty. It would be unreasonable to assume that not one member of the jury, in sentencing Kordenbrock, gave weight to the confession when considering the death sentence. Both as an element of the offense and as a reason for imposing the death penalty, the state attempted to prove that Kordenbrock consciously formed an intent to kill independently and uninfluenced by any effect drugs and alcohol may have had on his mental and emotional state. Logically a juror could easily reason that the inadmissible statement that Kordenbrock fired "at their heads so that they wouldn't get up" implies a mental process of deliberation and forethought sufficient to exclude drugs and alcohol as an immediate or direct cause of the homicide. The defense of diminished capacity turns in part on the factfinder's

reasoning about what impelled the defendant to kill: his intent, or the influence of drugs or alcohol on his behavior. Determination about intent and causation in such a case are complex depending on inferences to be drawn from the facts. The inadmissible statements in the confession tend to establish premeditation and are hence inconsistent with the impulsive, reactive and reckless behavior associated with events caused by the influence of drugs and alcohol.

As Judge Kennedy's dissent points out, the circumstantial evidence surrounding the shootings supports a finding of intent to kill. If coupled with the circumstantial evidence that Kordenbrock shot both men execution-style from behind, Kordenbrock's statements that he "pulled the trigger, aiming and firing at [the two men's] heads so that they wouldn't get up" could lead a juror to determine that Kordenbrock consciously formed an intent to kill unaffected by drugs or alcohol. If the jury did not hear these statements, however, the other evidence is not nearly so suggestive. Prior to the coerced confession, Kordenbrock told the police that his eyes were half-closed when he shot the two men and that he did not aim at any particular spot. These statements tend to support Kordenbrock's diminished capacity defense, and a jury hearing this information instead of the coerced confession would certainly view the circumstantial evidence differently. One cannot say beyond a reasonable doubt that the coerced confession did not influence how at least one juror viewed the circumstantial evidence as to whether Kordenbrock had the requisite intent to commit a capital crime.

We are unable to say beyond a reasonable doubt that the portion of the confession in question did not contribute to the sentence. Indeed, after some deliberation the jury asked if they could sentence Kordenbrock to life without parole indicating an interest in imposing the harshest possible sentence short of death. The court said no. The jury was struggling with its decision, apparently uncertain which sentence to impose. If one member of the jury

believed that the illegal portion of the confession (which included the words that Kordenbrock "pulled the trigger, aiming and firing at their heads so that they wouldn't get up") tended to dispel arguments in mitigation, the constitutional error was harmful. It is impossible to say beyond a reasonable doubt that no juror held such a view.

III. Use of Confession To Establish Criminal Liability

We now turn to whether the admission of the illegally obtained confession was harmless error in the criminal liability or the guilt phase of the trial. First, the state argues on the question of criminal liability that Kordenbrock may not now raise any objection to the admission of the confession because he waived that right by personally confessing to the killing in his opening statement to the jury. (Kentucky judges sometimes allow, as in this case, the defendant to make an opening statement.) We find the waiver argument to be unpersuasive. The trial court overruled defense counsel's objections to the admission of his confession before trial. Thus, before the trial even began Kordenbrock knew his confession was going to be admitted as evidence. The state's attorney told the jury in his opening statement that Kordenbrock had confessed. Kordenbrock's strategic decision to confess the homicide but not the element of premeditation to the jury in his opening statement was a response to the trial court's pre-trial ruling. Kordenbrock asserted diminished capacity in his opening statement, a defense inconsistent with the state's use of the confession to prove intent to murder. Given these facts we decline to reach the conclusion that Kordenbrock waived his right to object to the admission of the illegal portion of the confession.

Likewise, we reject the state's argument that the Supreme Court's decision in *Oregon v. Elstad*, 470 U.S. 298 (1985), is applicable here. *Elstad* involved a young man who was questioned without being given *Miranda* warnings by police in his living room and confessed to a crime. After he was taken to the stationhouse and given

proper warnings he again confessed. Elstad argued at trial that his second confession should not be admitted because it was the fruit of the first tainted confession. The Supreme Court refused to adopt defendant's "cat out of the bag" theory and held that the *Miranda* warnings given defendant before the second confession removed the taint of the confession obtained in violation of *Miranda*. *Id.* at 318.

Elstad is inapposite here. The state argues that the initial *Miranda* violation was cleansed by Kordenbrock's second voluntary confession in open court. In *Elstad* the defendant furnished the police with virtually the same information about his crime in both confessions. Here Kordenbrock did not give the same highly incriminating confession at trial that he did during the police interrogation. He did not admit the same facts regarding premeditation. Kordenbrock is not claiming as did the defendant in *Elstad* that the second confession was the fruit of the first tainted confession and should have been suppressed. On the contrary, Kordenbrock sought to persuade the jury in his opening statement of his version of how the crime occurred which tended to negate premeditation.

Having determined that Kordenbrock did not waive his right to object to the admissibility of his confession which was taken in violation of *Miranda*, the Court must again decide whether that admission was harmless error. The *Chapman* standard "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

Under Kentucky law, the state must prove intent in order for the jury to return a verdict of guilty. Ky. Rev. Stat. Ann. § 507.020(1) (Baldwin 1984).[3] Although Kordenbrock concedes based on overwhelming physical

[3]Section 507.020 provides:

(1) A person is guilty of murder when:

and testimonial evidence that he was at the scene of the crime and pulled the trigger, the most harmful piece of evidence the state had on the issue of his premeditated intent to kill was the unlawfully obtained confession. The store owner testified that Kordenbrock shot him and his employee after he heard some glass break. However, it does not necessarily follow that Kordenbrock held a clear intent, unaffected by drugs or alcohol, to kill the two men. At trial Kordenbrock claimed that he was under the influence of drugs and alcohol at the time of the shooting and that the shooting was a reflex action. Likewise, the fact that Kordenbrock and his co-defendant "cased" the store for two days prior to the robbery does not prove that Kordenbrock intended to kill the two men -- it proves that he was planning to rob the store. *See Owen v. Alabama*, 849 F.2d 536, 540-41 (11th Cir. 1988) (where confession was only piece of direct evidence to prove defendant's intent to kill, admission of confession obtained in violation of *Miranda* not harmless error, even where evidence of defendant's guilt for victim's death was overwhelming).

Relying on *Burks v. Perini*, No. 85-3507 (6th Cir. Nov. 25, 1986) (unpublished opinion), the District Court found that Kordenbrock would have adopted the same trial strategy whether or not the confession had been admitted, thereby making the constitutional error harmless. *Kordenbrock*, 680 F. Supp. at 880. This reliance is misplaced. In *Burks*, admission of defendant's confession taken in violation of *Miranda* was found to be harmless error because of the existence of strong independent evidence pointing to defendant's guilt. Defendant testified that he had acted in self defense and that the admission of his confession had undermined his position. However, there was an eyewitness who testified that defendant was not acting in self defense. In this case there was independent evidence that Kordenbrock committed the crime, but there was no explicit evidence other than the

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(a) With intent to cause the death of another person, he causes the death of such person . . . .

confession that plainly tended to contradict Kordenbrock's contention that he was under the influence of drugs and alcohol and did not intend to cause death. For this reason *Burks* is inapplicable.

Here the state pushed hard to get the illegal portion of the confession into evidence on the assumption that the confession would likely influence the jury. We agree with that assumption.

Thus, employing the *Chapman* harmless error rule, we find that the state did not prove, beyond a reasonable doubt, that the admission of the confession which was taken in violation of *Miranda* "did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The evidence of intent, inferable from the physical facts of the homicide, is strong but not so overwhelming as to make the jury's verdict on intent a foregone conclusion beyond a reasonable doubt. In death cases such as this, if the *Miranda* and *Chapman* rules are to retain any vitality and not be overruled *sub silentio*, we must not allow police officers and prosecutors to use at trial evidence taken in clear violation of the Fifth and Sixth Amendments, evidence which could have affected the outcome of the case.

IV. Coerced Confession

Relying on the same facts that support his *Miranda* claim discussed in Parts II and III above, Kordenbrock claims alternatively that his confession was "involuntary" and therefore inadmissible under the due process clause as well as the Fifth Amendment. By threatening him that his failure to cooperate could result in the detention and interrogation of his girlfriend and others, Kordenbrock contends that police overbore his will in extracting a confession that was "not 'the product of a rational intellect and a free will.' " Petitioner's Brief at 63. Due process analysis in a confessions case requires a reviewing court to consider both the procedural fairness of and the compulsion level created by a particular police practice.

See Gallegos v. Colorado, 370 U.S. 49, 50-52 (1962); *see also McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir. 1988) ("[P]etitioner must prove that his will was overborne *because* of the coercive police activity in question."), *cert. denied*, 109 S. Ct. 1744 (1989).

In this case, however, it is unnecessary to submit to constitutional analysis the identical facts that a majority of this Court has held in Parts II and III to be violative of the Fifth Amendment privilege against self-incrimination under *Miranda*. The Supreme Court precedents interpreting the scope of that privilege set forth the legal consequences of Kordenbrock's custodial interrogation. *See Edwards v. Arizona*, 451 U.S. 477 (1981) (questioning must cease once suspect invokes right to counsel unless suspect initiates communication); *Michigan v. Mosley*, 423 U.S. 96, 104-06 (1975) (invocation of "right to cut off questioning" protects suspect from "repeated efforts to wear down his resistance"); *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966) (once warnings have been given, "[i]f the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease.") Having found already that police violated Kordenbrock's Fifth Amendment privilege as enunciated in the *Miranda* precedents, we need not reconsider whether those same facts can be constructed so as to establish another similar constitutional violation. Harmless error analysis would yield the same result in both instances. *See ante* Parts II and III. Accordingly, the Court finds no grounds for additional relief based on the due process clause.

V. Miscellaneous Claims

Kordenbrock raises a set of five other claims which the Court believes do not warrant relief. He claims that the prosecutor's comments violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985); that mitigating testimony was improperly excluded; that he was entitled to a change of venue because of adverse publicity; that the trial judge should have recused himself; and that his due process

rights were violated by the erasure of his taped confession and the loss of a photo display and a vial of pills. We consider each of these arguments in turn.

A. *Caldwell* Violation

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), state law placed the responsibility for imposing the death penalty with the jury. The prosecutor in *Caldwell* told the jury that their decision was not final and that their decision was automatically reviewable by the state supreme court. The Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29.

During voir dire in this case the prosecutor told jurors that their "recommendation of death, if you gave one as a juror, with your fellow jurors, would not be binding upon the court, but that the [c]ourt would give it great weight." Petitioner's Brief at 73. The prosecutor characterized the jury's sentence as "a recommendation, that is all." *Id.* at 74. Further, the instructions that the trial judge gave to the jury used the word "recommend" in reference to the sentence. Joint App. at 152.

The prosecutor's conduct in this case does not violate *Caldwell* because Kentucky law itself provides that:

> the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist *and to recommend a sentence* for the defendant. Upon the findings of the jury, *the judge shall fix a sentence* within the limits prescribed by law.

Ky. Rev. Stat. Ann. § 532.025(1)(b) (Baldwin Supp. 1989) (emphasis added). Thus, the prosecutor technically

stated Kentucky law correctly. Similar state sentencing schemes dividing responsibility between judge and jury have been upheld. *See, e.g., Walton v. Arizona*, 110 S. Ct. 3047 (1990) (judge makes findings on aggravation and mitigation and imposes sentence); *Hildwin v. Florida*, 109 S. Ct. 2055 (1989) (jury makes a recommendation without findings on aggravation and then judge imposes sentence).

In order to make out a *Caldwell* violation, Kordenbrock must show that the prosecutor improperly described the jury's role under state law in order to water down their responsibility. *Dugger v. Adams*, 109 S. Ct. 1211, 1215 (1989). The Eleventh Circuit has held that to make out a constitutional violation under *Caldwell* there must be "some affirmative misstatement or misconduct that misleads the jury as to its role in the sentencing process . . . . [E]mphasizing the 'advisory' role of the jury, or the fact that the jury is making a 'recommendation' to the judge, does not support a *Caldwell* claim." *Harich v. Dugger*, 844 F.2d 1464, 1473-74 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1355 (1989). We find no misstatement of state law sufficient to trigger a *Caldwell* violation in the instant case.

Kordenbrock also turns to state law for relief. After the sentence and appeals in this case, the Kentucky Supreme Court in *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988), held that in the future juries should be instructed to "fix" not "recommend" death sentences. But the court declined to apply the new rule retroactively which means that the prosecutor and the judge did not misadvise the jury concerning the division of sentencing authority.

Thus, although Kordenbrock raises an arguable point worthy of serious consideration, we do not believe that the prosecutor's statements rise to the level of a *Caldwell* violation.

B. Trial Court's Denial of Mitigation Witness

The trial court denied defense counsel's request to call Dr. Stassen, an Associate Professor of Christian Ethics at the Southern Baptist Theological Seminary in Louisville, during the sentencing phase. Dr. Stassen met with petitioner for about 45 minutes and would have testified that petitioner was remorseful, that he no longer used drugs, and that he could possibly be rehabilitated. The District Court found the exclusion of this testimony both irrelevant and harmless beyond a reasonable doubt. *Kordenbrock*, 680 F. Supp. at 888-90.

Both *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), require that juries be allowed to consider all relevant mitigating evidence with the limitation that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12. Although an expert in ethics, biblical studies and Christian theology, Dr. Stassen was not an expert on the subjects for which he was called to testify, and the exclusion of Dr. Stassen's testimony did not constitute constitutional error on the part of the trial judge. The propriety of the District Court's decision is bolstered by the fact that Reverend Feamster, Kordenbrock's minister, was allowed to testify about his character.

C. Change of Venue

Kordenbrock claims that as a result of adverse publicity he was entitled to a change of venue. A jury psychologist conducted a poll on the opinions of people in surrounding counties who were eligible for jury service. In four out of five counties over 80% of the people polled had heard about the case and in three out of five counties almost 50% of the people polled thought Kordenbrock was guilty of murder. Petitioner's Brief at 111-112; *see also* Joint App. at 171-182 (charts on effect of publicity).

In *Murphy v. Florida*, 421 U.S. 794 (1975), the Supreme Court delineated the standard for determining juror impartiality where there is widespread, extensive media coverage.

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961), *quoted in Murphy*, 421 U.S. at 800.

The District Court held that despite the poll "not a single juror or alternate *seated* in the case at hand had formed any opinion on the guilt or innocence of petitioner." *Kordenbrock*, 680 F. Supp. at 887. We find no error in the District Court's findings that the jurors could render a verdict based on the evidence presented in court and that their capacity for impartiality was not compromised.

D. Recusal of Trial Judge

After the trial judge refused to grant Kordenbrock's motion for a change of venue, Kordenbrock filed against the judge an application for a writ of prohibition to prevent the judge from hearing the case. The prosecutor in this case handled the proceeding representing the interests of the state and the trial judge. Joint App. at 63-66. Defense counsel then made a motion for the judge to recuse himself which was denied. *Id.* at 67.

In *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.), *cert. denied*, 474 U.S. 908, 1034 (1985), the Fifth Circuit held that recusal was not necessary where there was no evidence of specific conduct by the trial judge

which prejudiced defendant. *Harrelson*, 754 F.2d at 1165. There is no basis in this record to base a finding that the judge was biased against Kordenbrock. Certainly the fact that the prosecutor handled the prohibition proceeding is not a basis for such a finding.

E. Destruction of Evidence

Lastly Kordenbrock claims that his due process rights were violated when the police erased his taped confession, lost a bottle of pills which were present while he was being interrogated, and lost the photo display which they showed to Mr. Thompson, the store owner, for purposes of identification.

In *Arizona v. Youngblood*, 109 S. Ct. 333 (1988), the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 337. Apparently Detective Stamper's secretary, who transcribed the confession, erased the tapes after consulting with the detective. Joint App. at 1065-66. From the facts it does not appear that police acted in bad faith in this respect.

Detective Stamper admitted that there was a bottle of drugs on the table in front of Kordenbrock during the interrogation, but did not order that the pills be tested, nor did he preserve the bottle. Joint App. at 1069-71. In *California v. Trombetta*, 467 U.S. 479 (1984), the Supreme Court held that in order to show that an error of constitutional magnitude occurred in destroying evidence, the evidence must have had exculpatory value and there must have been no other way to get comparable evidence. Trombetta, *Id.* at 488-89. In this case Kordenbrock was not prevented from presenting his defense of diminished capacity because the police failed to preserve and test the pills.

Kordenbrock argues further that the store owner's identification of him was influenced by the overly

suggestive nature of the photo display which the police failed to preserve. The Supreme Court set out five factors to consider in determining whether an identification was proper in *Neil v. Biggers*, 409 U.S. 188 (1972): (1) the opportunity for the witness to view the accused; (2) the witness' attention; (3) the accuracy of the witness' prior description; (4) the witness' certainty; (5) the amount of time between the crime and the identification.

All five of the *Neil* factors are met in this case. Mr. Thompson, the store owner, had seen Kordenbrock enter his store twice before the robbery took place. His description of Kordenbrock was accurate, he was certain at the time of the identification, and the amount of time between the crime and the identification was relatively short -- less than a month after the crime. Moreover, Kordenbrock has never denied that Thompson's identification is correct, and any error in the photo display, if one had occurred, would be harmless beyond a reasonable doubt. There was no issue at trial about identification.

The fact that the photo display was lost does not help Kordenbrock's case. The misplacement or destruction of the display does not entitle Kordenbrock to a presumption that a constitutional violation has occurred. Under the *Trombetta* test, the display would have not had any exculpatory value.

VI. Refusal to Provide Psychiatric Expert for Defense

A. Applicability of *Ake v. Oklahoma*

The Court holds that *Ake v. Oklahoma*, 470 U.S. 68 (1985), should not be read to include a defendant who contests the mental element of the crime and the appropriateness of the death penalty due to diminished capacity. I respectfully dissent. In *Ake* the Supreme Court held that an indigent defendant is entitled under the due process clause to expert psychiatric assistance where a defendant's sanity is a significant issue. The Supreme

Court further held that a defendant did not have "a constitutional right to choose a psychiatrist of his personal liking. . . ." *Id.* at 83. The Supreme Court expressed concern that the indigent defendant have access to a "competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense.*" *Id.* (emphasis added).

The Supreme Court did not address the precise issue of whether an indigent defendant would be entitled to a psychiatric expert when diminished mental capacity rather than insanity is the issue at trial, or when diminished mental capacity is the issue at the capital sentencing hearing. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court declined to reach an issue raised by petitioner that the state failed to appoint experts and investigators to aid him in his defense. The Court did not reject Caldwell's argument that an expert may be constitutionally required on issues other than sanity. It stated that petitioner had not presented a strong enough case. *Caldwell*, 472 U.S. at 323 n.1. Caldwell's motion requesting a ballistics expert did not adequately explain why such an expert was necessary. *Id.*

Two reasons argue that *Ake* covers cases where mental capacity is seriously in issue both on the question of the existence of the intent element of the crime and the question of mitigation of a sentence of death because of diminished capacity: *first*, the law from other circuits and *second*, the reasoning of the Court in *Ake*.[4]

Other circuits have read *Ake* to apply to nonpsychiatric experts. *See Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (1988); *Moore v. Kemp*, 809 F.2d 702, 711-12 (11th Cir.) (en banc), *cert. denied*, 481 U.S. 1054 (1987) (Eleventh

[4]The state raises no claim of the nonretroactivity of the *Ake* rule, as applied to the instant case, under the doctrine of *Teague v. Lane*, 109 S. Ct. 1060 (1989). The state has waived any argument based on *Teague*.

Circuit "assume[d], for sake of argument, that the due process clause could require the government, both state and federal, to provide nonpsychiatric expert assistance to an indigent defendant upon a sufficient showing of need.").

In *Little*, the Eighth Circuit held that the indigent defendant in that case was entitled to the assistance of a nonpsychiatric expert where mental state was not a factor and the death penalty was not possible. The dispute in *Little* arose from the victim's identification of the defendant, which occurred only after the victim was hypnotized. The defendant in *Little* was denied funds to hire his own hypnotist expert and was convicted largely due to the victim's identification. Judge Arnold, writing for the Eighth Circuit *en banc*, read *Ake* to include nonpsychiatric testimony:

> The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given.

Little, 835 F.2d at 1243. In *Little* the court required such expert assistance even where the death penalty is not possible.

> Nor do we draw a decisive line for due-process purposes between capital and noncapital cases. To be sure, the defendant's interest in staying alive is greater and different in kind from his interest in avoiding a prison term, but the latter interest, in our opinion, still outweighs the state's interest in avoiding the relatively small expenditure that would be required.

Id. at 1243-44.

Other courts have also addressed the question of what *Ake* requires and when its strictures would be applicable,

but no circuit has disagreed with the Eighth Circuit's principle that the question should turn on "how important the scientific issue is in the case." *Id.* at 1243. *See United States v. Crews*, 781 F.2d 826, 833 (10th Cir. 1986) (indigent defendant raising an insanity defense entitled to aid of psychiatrist); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("when an indigent accused makes a clear showing . . . that his mental condition will be a significant factor at trial," judge must furnish expert).

The Supreme Court's position in *Ake* arises from its earlier admonition that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also Douglas v. California*, 372 U.S. 353 (1963) (state must insure that defendant has meaningful chance to present his defense); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state must furnish indigent defendant with trial transcript).

The Supreme Court in *Ake* furthered the definition of "basic tools" to include a psychiatrist for an indigent defendant where sanity is a significant factor at trial. The *Ake* court found that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77. The Court employed the *Mathews v. Eldridge*, 424 U.S. 319, 325 (1976), three-prong test to determine whether "the State [must] provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." *Ake*, 470 U.S. at 77. The three factors the Court considered were: (1) "the private interest in the accuracy of a criminal proceeding" which the Court found to be "uniquely compelling," *id.* at 78; (2) the state's interest that would be affected by providing expert assistance which the Court found to be "not substantial," *id.* at 79; and (3) "the probable value of the

psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered." *Id.*

It is a somewhat different, though closely related, question whether the "basic tools" of the defense should include the need for the state to furnish an expert where mental capacity rather than sanity *per se* is an issue. The Supreme Court left that question open in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). I conclude that, as a matter of due process, the state must provide a psychiatric expert where the defendant demonstrates that an expert is necessary to aid in a proper defense, and that without that expert the result of the trial would be unfair. *See Little v. Armontrout*, 835 F.2d at 1244.

Applying the *Ake* three-prong analysis to this case, the first and last parts of which go to the importance of the scientific issue in the case, I believe that Kordenbrock was entitled to a psychiatric expert. His interest in the accuracy of the criminal proceeding -- having the jury be in a position to understand the mental and psychiatric aspects of the case -- outweighs the cost to the state in furnishing experts. After all, it is the state which is seeking to put the defendant to death. Compared to that cost, the cost of a psychiatric expert pales. The defendant's interest is the more "compelling" of the two. In this case the psychiatric assistance on the subject of diminished capacity would have been valuable to the jury so that it could better understand Kordenbrock's character and family circumstances in weighing aggravating and mitigating factors and better understand exactly what effect the drugs and alcohol had on him. For the same reasons given in *Ake* for requiring a psychiatric expert, the risk of ignorance and error respecting the defendant's mental processes in the trial without psychiatric assistance in this case was high. The jury needed the assistance of an expert to help it understand fully the nature of Kordenbrock's case.

My view of "how important the scientific issue is in the case" -- to use Judge Arnold's phrase in *Little* -- is

reinforced by the trial judge's own effort to provide a defense expert. The trial judge believed it was important. He ordered it twice. His efforts were thwarted by the refusal of the state and local governments to pay, not because the trial judge thought the expert assistance would have been unimportant.

B. Whether Counsel Deliberately Failed to Secure Payment for the Expert

Having concluded that Kordenbrock was denied his constitutional right to have an expert aid in his defense because of his indigence, I turn to the state's alternative arguments that defense counsel did not pursue payment for the expert deliberately to create an appealable issue, that the state psychiatrist satisfied Kordenbrock's right to expert assistance, and that the testimony of a pharmacologist satisfied Kordenbrock's right to expert assistance.

The District Court found that defense counsel failed to ensure that Dr. Nizny received payment because the doctor's report was unfavorable. *Kordenbrock*, 680 F. Supp. at 872. A close examination of the facts and the doctor's report reveals that this finding was erroneous.

After the Fiscal Court refused to pay the doctor, defense counsel alerted the trial judge of its refusal. The trial court again ordered the Fiscal Court to pay the bill. This order was again ignored. The parties were at an impasse at this point. The trial judge, after defense counsel's third request for an order, refused to enter the order until Dr. Nizny filed his report. Dr. Nizny refused to file his report until payment was guaranteed.

The District Court found that defense counsel could have done more to ensure Dr. Nizny's testimony, such as ask the trial judge to hold the Fiscal Court in contempt or to subpoena Dr. Nizny. *Id.* However, Dr. Nizny resided in Ohio, beyond the subpoena power of a Kentucky

Court.[5] Defense counsel did not initiate a contempt proceeding in an attempt to secure payment for Dr. Nizny, but the dispute about payment was not caused or brought about by defense counsel. It was caused by the conduct of the Fiscal Court and the state. Petitioner should not be punished because the state could not decide who should be responsible for providing funds for an expert.

As support for its contention that defense counsel was deliberately attempting to create an appealable issue, the District Court cites the unfavorable nature of Dr. Nizny's report. *Kordenbrock*, 680 F. Supp. at 872. A reading of the doctor's report shows that it was not entirely unfavorable. Defense counsel wanted Dr. Nizny to testify as to Kordenbrock's state of mind at the time of the shooting as well as other possible mitigating factors. Dr. Nizny found that Kordenbrock "was almost continually under the influence of alcohol and/or a variety of drugs and medications from age 14 to his incarceration in January, 1980 . . . . This 10 to 11 year span was, to my knowledge, never interrupted by more than a number of hours or days." Joint App. at 269. The doctor's report took into account Kordenbrock's drugs and alcohol intake the morning of the shooting in determining his state of mind. Dr. Nizny found that when the two men entered the store to rob it, Kordenbrock "was aware of his actions though he ignored risks and demonstrated bad judgment . . . ." *Id.* at 270. As for the shooting itself, the doctor's report states that "[t]wo almost simultaneous events, in my view, precipitated his shooting the two men. He heard the glass gun case crash and one man apparently started to rise from the floor." *Id.* The doctor refers to petitioner's actions as "reflex-like" and "impulsive." *Id.* According to Dr. Nizny, Kordenbrock's drug use "decreas[ed] [his] self control" and gave him a "sense of indestructability [sic]." *Id.* at 270-71.

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[5]Ky. R. Crim. P. 7.02(5) provides in pertinent part:

> A subpoena requiring attendance of a witness at a hearing or trial may be served at any place within the Commonwealth.

As to other possible mitigating factors, the doctor's report indicates that Kordenbrock was not "a man totally self centered or totally devoid of feeling for another person." *Id.* at 271. The doctor would also have been able to testify about the effect Kordenbrock's family life had on him. *Id.* at 270.

There were some very significant unfavorable aspects of the doctor's report which came out during the evidentiary hearing that the District Court held on the matter. Kordenbrock told Dr. Nizny that he had killed another man in the course of robbing a gas station the night before the shooting in the auto parts store.[6] *Id.* at 1266. At the evidentiary hearing held by the District Court, the prosecutor contended that the doctor's knowledge of the prior crime was relevant to prove Kordenbrock's modus operandi of eliminating witnesses. *Id.* at 1273. This is a debatable point. Defense counsel argued that any possible relevance of this information would be outweighed by its overwhelming prejudice. *Id.* at 1277. Without citation of authority, the District Court found that "any judge would have let [the prosecutor question Dr. Nizny on this issue]." *Id.* at 1275. The judge stated that "by putting the Doctor on you'd have made the whole history relevant." *Id.* at 1277. The fact is that the trial judge never had an opportunity to rule on this question in limine or otherwise because of the state's conduct. We only know that the state judge believed that a defense psychiatric expert was important.

The prosecution's purpose in this line of questioning in the District Court was to show that defense counsel never intended to put Dr. Nizny on the stand because of his knowledge about the crime which took place the night before. But this is pure speculation based on no facts. Even if the trial judge had allowed the doctor's testimony on that issue, in the doctor's opinion the crimes occurred under "identical kinds of circumstances." *Id.* at 1278.

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[6]Petitioner had been charged with the murder of a gas station attendant but had not yet been indicted.

His knowledge of the prior incident did not change his opinion of Kordenbrock's actions on the day of the shooting. *Id.* at 1288.

In fact, Dr. Nizny's report and his testimony would have been significant on the issue of intoxication as a mitigating circumstance. The jury could then have decided whether to accept his testimony. The doctor's report stated that Kordenbrock's "intoxication interfered with the capacity to form a specific intent to commit the crimes." *Id.* at 273. Dr. Nizny also testified before the District Court that "I don't see him forming an intent to end someone's life," *id.* at 1225, obviously a fact of importance. The jury might have found this evidence important on the question of death, a subject on which the jury had doubts.

C. Whether State Psychiatrist Satisfied *Ake*

The state also claims that if Kordenbrock was entitled to a psychiatrist, the state psychiatrist satisfied that right. I find this argument unpersuasive. *Ake* requires that a psychiatrist who serves as a defense expert "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. A "neutral" expert would not be able to serve this purpose. From the facts it appears that the state psychiatrists at the Grauman Forensic Psychiatry Services would not be able to serve as defense experts.

Defense counsel wrote to the Secretary of the Department of Human Resources and asked if psychiatrists at the Grauman Unit could perform this service, and the response was a clear "no." Dr. Stumbo, the Secretary, responded that Grauman psychiatrists were only permitted to perform "objective evaluation[s]" and that their services were "supplied as a service to the court, and not to either the prosecution or defense." Joint App. at 162. In addition Dr. Bland, the state psychiatrist who examined petitioner, "indicated [to defense counsel] that he could not examine Paul as [a] defense psychiatrist

because of the Secretary's directive." *Id.* at 166. Paul Farin, general counsel for the Department of Human Resources, also testified that a Grauman psychiatrist "[was] to be neutral in the evaluation process," and that he would not be permitted to testify as to all possible mitigating factors. *Id.* at 1169. With this factual background it is not surprising that defense counsel ordered Kordenbrock not to cooperate with Dr. Bland, a state psychiatrist who was under no duty to treat the psychiatric examination in confidence.

At the evidentiary hearing held by the District Court, Dr. Bland testified that he would have been able, despite the Secretary's directive, to testify as to mitigating factors. *Id.* at 1114. These factors would include family background and environmental factors. *Id.* at 1118. However, during the time that Dr. Bland would have served as an expert for Kordenbrock, he was only available for defense planning of a case "in a limited way." *Id.* at 1122. Dr. Bland testified that a Grauman psychiatrist would have investigated all issues, "[b]ut . . . might not and potentially would not include the depth of areas that might be pursued by a defense-only psychiatrist in terms of looking for everything possible in favor [of] the defendant." *Id.* at 1123-24.

There was also a question of whether records kept by a Grauman psychiatrist would remain confidential. *Id.* at 1125. Indeed, defense counsel testified that he was aware of "two specific instances . . . involving public defenders . . . where confidentiality . . . [was] breached." *Id.* at 1183.

Thus, it was not unreasonable for defense counsel to conclude that he needed a defense expert, not Dr. Bland. In order to perform the services required under *Ake*, defense counsel believed he needed Dr. Nizny's testimony and assistance.

D. Whether Pharmacologist Satisfied *Ake*

Finally the state claims that Kordenbrock's rights under *Ake* were satisfied by the pharmacologist's testimony. I find this argument to be equally unpersuasive. Because defense counsel was not able to locate another psychiatrist before trial, counsel called Dr. Nelson, a pharmacologist, to testify. Dr. Nelson testified as to Kordenbrock's drug addiction and to his mental state on the day of the shootings: "He . . . had a diminished ability to exercise judgment, ethical decisions, and formulate complex thoughts." *Kordenbrock*, 889 F.2d at 77. The original panel in this case found that the pharmacologist's testimony satisfied Kordenbrock's need for an expert because he testified explicitly on the issue of his defense. *Id.*

The purpose of a psychiatric expert was not only to testify as to Kordenbrock's intent to commit the crime. The jury was also entitled to consider all mitigating circumstances to which Dr. Nizny would have testified. *See Lockett v. Ohio*, 438 U.S. 586 (1978). Dr. Nelson was not qualified to testify about other possible mitigating factors.

This is especially true in light of the witnesses called by the prosecution. To rebut the pharmacologist's testimony, the state called a medical doctor who testified that as a medical doctor he was more qualified to discern Kordenbrock's state of mind than a pharmacologist. The doctor disputed the pharmacologist's opinion about the effect of drugs on Kordenbrock, claiming that Kordenbrock had developed a tolerance to drugs and alcohol. Dr. Nizny testified at the District Court evidentiary hearing, and could have testified at trial, that "there was some evidence that [Kordenbrock] was developing tolerance to the [Q]uaaludes." Joint App. at 1237. However, he also testified that Kordenbrock probably had not developed a tolerance to alcohol, *id.*, and that when petitioner entered the store he was under

the influence of both alcohol and Quaaludes. *Id.* at 1221-22.

VII. Failure to Instruct Jury on Mitigating Factors

Kordenbrock also argues that the trial court erred in failing to instruct the jury properly on mitigating circumstances. He claims that jurors need to be told exactly how the penalty phase of a capital trial works. He argues that if juries are not specifically told about the procedure for determining mitigating circumstances they tend to operate as a unit. There is a great danger that a mitigating factor will not be considered when only one juror believes it exists because of the general assumption drawn from other instructions that the jury must act unanimously.

After the penalty phase the trial judge instructed the jury that an aggravating factor had to be found unanimously but refused to give defense counsel's proffered instruction that the jury need not be unanimous with regard to mitigating factors.[7]

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Supreme Court held that a state sentencing form which

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[7]The trial court instruction on aggravating circumstances reads in part:

> In recommending a sentence for the defendant Paul Kordenbrock for the murder of Stanley Allen, you shall consider the following aggravating circumstance, if you believe from the evidence beyond a reasonable doubt that it exists . . . .

Joint App. at 154.

The instruction on mitigating circumstances reads in part:

> In recommending a sentence for the defendant Paul Kordenbrock you shall consider such mitigating or extenuating facts and circumstances as have been presented to you in evidence and you believe to be true, including but not limited to such of the following as you believe from the evidence to be true . . . .

Joint App. at 155.

could reasonably be interpreted to require the jury to agree unanimously that a particular mitigating circumstance existed was unconstitutional because it precluded the sentencer from considering relevant mitigating circumstances. The Court in *Mills* found that some jurors could have reasonably believed that in order to find a mitigating circumstance they had to agree on it unanimously. *Id.* at 384. In *Mills* it was clear from the sentencing form that in order to find the existence of an aggravating circumstance the jury had to be unanimous. However, it was not clear from the sentencing form whether a finding of a mitigating circumstance required unanimity. The Court found that "[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." *Mills*, 486 U.S. at 376. The Court used the following standard in determining whether the verdict should stand: "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." *Id.* at 377.

Two circuits have considered the question of what type of instruction on mitigating circumstances is required by the Constitution. In *Davis v. Maynard*, 869 F.2d 1401 (10th Cir. 1989), *cert. granted and judgment vacated on other grounds*, 110 S. Ct. 1516 (1990), the Tenth Circuit held that an instruction defining the role of mitigating circumstances was not necessary. *Davis*, 869 F.2d at 1411. The court found that while the Constitution does require that the jury understand the function of mitigating factors in the sentencing scheme, a specific instruction was not mandated. *Id.* In *Davis* "[t]he jurors were instructed that mitigating factors should be accounted for in reaching their decision, and that such factors should be balanced against any aggravating circumstances found to exist beyond a reasonable doubt in deciding between life and death. That is all the Constitution requires." *Id.*

The Seventh Circuit took a contrary view in *Kubat v. Thieret*, 867 F.2d 351 (7th Cir.), *cert. denied*, 110 S. Ct. 206 (1989). After considering Kubat's claim that his

counsel's performance was deficient because he failed to object to the trial court's instructions, the court addressed Kubat's claim that the jury instructions standing alone required reversal as violative of the Eighth Amendment. The Seventh Circuit construed *Mills* to place certain limitations on how a trial court must instruct a jury during the sentencing phase of a capital case. The court relied on the Supreme Court's language that " 'common sense . . . suggest[s] that juries do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation, . . . unless they are expressly instructed to do so.' " *Kubat*, 867 F.2d at 373 (quoting *Mills*, 486 U.S. at 383). Because juries are likely to act as a unit in sentencing, the court found that the danger of a tainted sentence was high where jurors are "never expressly informed in plain and simple language that even if one juror believed that the death penalty should not be imposed, [petitioner] would not be sentenced to death." *Id.*

In this case, as in *Mills*, "[n]o instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor." *Mills*, 486 U.S. at 379. I believe there is a "substantial possibility" that the jury construed the instructions to mean that mitigating as well as aggravating circumstances could be found only if the jury was unanimous. The trial judge refused to instruct the jury on this very important point in spite of defense counsel's objections and proffered instruction. It is likely from the jury's question about whether they could sentence Kordenbrock to life without parole that they were struggling with mitigating factors. One or more jurors may have believed there were mitigating circumstances. Because the jurors in this case were told that aggravating factors had to be unanimous, but were not told exactly what role mitigating factors play, it would have been reasonable for them to assume that mitigating factors had to be found unanimously as well.

Death is the ultimate punishment. We must be certain that juries carry out their roles properly in death penalty cases. I believe the jury was confused on the unanimity question concerning mitigation and that the verdict of death may not have been imposed had they understood that one juror could block the death sentence if he or she believed there were sufficient mitigating circumstances.

VIII.

Accordingly the judgment of the District Court is reversed and the case remanded to the District Court with instructions to issue the writ of habeas corpus giving the state an appropriate period of time to conduct a retrial as to both criminal liability and sentence.

KENNEDY, Circuit Judge, dissenting, with whom Judges KRUPANSKY, GUY, and BOGGS concur in all parts, Judge MILBURN concurs in parts III & IV, Judges NELSON and RYAN concur in part IV, Judge WELLFORD concurs in parts I, II & IV, and Judge NORRIS concurs in parts I, III & IV.

I concur in Part V of the majority opinion. I also accept that appellant's written confession was obtained in violation of his *Miranda* rights. The District Court so found and that finding was not appealed. However, because I believe that the admission of appellant's confession was harmless error beyond any reasonable doubt with respect to both the liability and sentencing phases of trial, I must respectfully dissent. I also would hold, as I did in my opinion for the panel, that there was no *Ake v. Oklahoma*, 470 U.S. 68 (1985), violation and that the jury instructions did not violate appellant's constitutional rights.

I.

Use Of the Confession to Establish Criminal Liability

First, I believe beyond any reasonable doubt that the admission of appellant's confession was harmless with regard to the liability phase of trial.[1] The majority says it

[1]Although the state did not honor appellant's right to end the interrogation, I do not believe appellant's confession was involuntary or coerced. Both the state courts and the District Court found that appellant's will was not overborne and that his confession was the product of free will and rational choice. *See United States v. Murphy*, 763 F.2d 202 (6th Cir. 1985). Voluntariness of a confession is a mixed question of law and fact and a reviewing court "will not disturb the trial court's findings . . . unless clear error appears on the record." *Id.* at 206. Voluntariness is determined by the totality of the circumstances surrounding the confession, taking into consideration the accused's age, intelligence, physical condition and emotional state, and the inherent coerciveness of the interrogation setting. *Id.* at 205.

Review of the record shows that although the interrogators at times threatened that several of appellant's friends would be arrested if he did not continue to give a fuller statement, the record as a whole indicates that the trial court's finding of voluntariness was not "clear

was prejudicial error because the confession was the only concrete, uncircumstantial evidence of appellant's intent to commit the shootings. However, as the Court readily admits, there was also strong circumstantial evidence from which appellant's intent could be inferred. Properly framed, the question is whether the outcome of the trial or conduct of the defense would have been different had the confession been suppressed.

It is beyond a reasonable doubt that the verdict of guilty of capital murder against appellant would have been the same regardless of the admission of the confession. The evidence establishing appellant's guilt in the murder and shooting was overwhelming. The surviving victim of the shooting positively identified appellant and testified how the murder and attempted murder occurred. Appellant, in the course of robbing the store, ordered the two store employees to the back room, forced them to lie prone, and then shot them execution-style. Even if the confession had not been admitted, the only defense available to appellant would be to admit the killing and shooting, but to deny intent because of drug and alcohol use.

The identity of appellant was conclusively established. William Thompson, the surviving victim, had ample opportunity to observe appellant. Two days before the robbery appellant and Michael Kruse were at the Western Auto store from 1:00 to 1:30 p.m. examining woodcutting tools. Thompson was alone at the store and Stanley Allen was at lunch. The next day, appellant and Kruse again went to the store at 1:00 p.m., and appellant purchased a hatchet. Appellant also saw several guns in a glass display case and asked to look at a Colt Python pistol. Thompson showed him the gun and appellant and Kruse left the store without incident.

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error." Appellant was cogent, there was no force or threat of force by police, and he was not emotionally distressed. *Cf. United States v. Brown*, 557 F.2d 541 (6th Cir. 1977).

Further, less than an hour after the robbery, appellant and Kruse went to a Gary Ramell's home where they sold him three of the stolen guns for $200. They then went to the home of Richard Fehler where at 10:30 a.m. they sold two guns, payment for which was due January 15, 1980. According to Fehler, appellant appeared jittery and took some Quaaludes. That afternoon, appellant met a Larry Hensley who purchased six guns for $300, payable the next day. In the meantime, Ramell saw a newscast about the robbery and murder which included composite drawings resembling appellant and Kruse. Hensley also saw the news and noticed that the guns he bought from appellant came in a Western Auto box containing broken glass. Ramell, Fehler, and Hensley decided to cooperate with the police. Hensley arranged to meet appellant at 10:00 p.m., the day following the robbery, to pay for the guns he received from appellant. Appellant was arrested at 10:10 p.m. that night.

Any claim of accidental shooting was impossible in view of the manner in which *both* store employees were shot. The only possible explanations for shooting the men, one in the back of the head and the other in the back of the neck, were that they were attempting to get up or that appellant was attempting to execute them so they could not identify the robbers. In the absence of diminished capacity, intent to kill was the only possible inference a reasonable juror could infer from the circumstances of the crime. The confession that he shot them so "they wouldn't get up" could not affect the outcome.

Had the illegal portion of appellant's confession been suppressed, appellant would have been required to adopt the same trial strategy out of necessity because he was not in a position to claim he did not commit the murders.[2]

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[2]Regardless of whether *Burks v. Perini*, No. 85-3507 (6th Cir. Nov. 25, 1986) is distinguishable from the present appeal, I see no alternative but that appellant would have been forced to admit that he did the killing. Just as Burks admitted the crime but claimed self-defense, appellant would have admitted the shooting but claimed

Before Kordenbrock asked to stop the interrogation, he had admitted committing the murder. This admission was made after he waived his *Miranda* rights. The basic admission of guilt was thus not obtained in violation of *Miranda*. He would have admitted the shooting and he would have claimed diminished capacity through drug and alcohol use. Given the strength of the circumstantial evidence establishing intent, his statement that he shot the men so "they wouldn't get up" gave relatively little additional basis for establishing intent. The most persuasive, damning indication of his intent lay not in the statement that he shot them so "they wouldn't get up," but rather in the facts and circumstances surrounding the crime. The statement in the confession is equivocal on the question of whether it proves intent--it could be an explanation for why he shot the men, or it could be an additional fact gratuitously added at the time of his confession. With or without admission of the confession, appellant would have to at least admit the fact that he shot the two men. The fact that he said in his written confession that he shot them so they wouldn't get up is no more indicative of intent to kill than would be the phrase "I shot them so we could escape" or "I shot them so they would not identify us." Once the circumstances of the shooting were established, there was no explanation except diminished capacity under which the jury would not infer intent to kill.

This case is readily distinguishable from *Owen v. Alabama*, 849 F.2d 536 (11th Cir. 1988), cited by the majority for the proposition that where an illegal confession is the only direct evidence of intent to kill, its admission is not harmless even where evidence establishing the defendant's guilt is overwhelming. In *Owen*, the defendant confessed to a shooting and said that "'[i]f I had a thousand [shells in the gun] I would have shot a thousand. Maybe this will teach them a lesson.'" *Id.* at 537 (quoting *Owen v. State*, 418 So.2d 214, 219

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diminished capacity. He would have done so because of the strength of the evidence pointing to his guilt.

(Ala. Crim. App. 1982)). The court determined its admission to be prejudicial error because it provided "significant support" for the state's case and because it undermined his insanity defense. Of course, Owen's confession clearly evidenced intent to kill. Appellant, on the other hand, merely stated that he shot the men and then explained why. Owen's statement was "dripping" with intent to kill, while appellant's statement was equivocal at most.

Appellant's oral statement to the jury also related essentially the same facts as his written statement--that he shot the two men after stealing the guns from the store, but without the "damning" language that he did it so they wouldn't get up. Appellant's only course, had the confession not been admitted, would be to make the same statement to the jury, either directly or implicitly in his defense. In either case, he would have to admit the deed. The clearest finding of intent stems from the facts that he would be forced to admit, with or without the confession. For that reason, I am convinced that the language of the confession did not prejudice him in the guilt phase of trial and that its admission was harmless beyond a reasonable doubt.

II.

Use of Confession at Sentencing

The majority's holding that admission of the confession was constitutional error on the sentencing phase of the trial is founded on the premise that appellant's written confession contained "extremely prejudicial and incriminating statements," Majority Opinion at 9, which "tended to undermine at the sentencing hearing the claimed mitigating circumstances of diminished capacity due to the use of drugs and alcohol." *Id.* at 10. According to the majority, the confession was "extremely prejudicial" in the sentencing phase because it omitted

reference to drug use[3] and because its tenor was "cold."[4] Neither of these reasons persuades me that admission of his confession prejudiced appellant, and I can find nothing in appellant's written confession which would tend to undermine his defense of diminished capacity and cause any member of the jury to reject it as a mitigating factor in sentencing. Indeed, careful review of the record and the evidence presented at trial leads me to conclude that appellant's confession could not have in any way undermined his claim of diminished capacity or prejudiced the jury in sentencing him to death. I will consider each of the majority's reasons in turn.

1. Omission of Reference to Drug and Alcohol Use

The Court first argues that appellant's claim of diminished capacity was prejudiced by the admission of his written confession because it did not mention drug or alcohol use. However, whether drug and alcohol use was mentioned in or supported by his written confession is irrelevant. The relevant inquiry is whether the confession logically precluded him from effectively asserting his defense of diminished capacity at trial. Obviously, it did not prevent him from making his defense. The majority seems to ignore the independent, substantive evidence appellant introduced at trial to prove diminished capacity. Consideration of such evidence is essential in determining whether the error in admitting the confession was

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[3]The majority seems to imply that the officers who conducted the interrogation and recorded appellant's confession intentionally deleted any reference to appellant's drug use prior to the shootings by "edit[ing] out facts" that would support his claim of diminished capacity. Majority Opinion at 5. Nowhere in the transcript of the interrogation is such an assertion supported. Officer Stamper recorded appellant's confession as appellant related it to him. In fact, at one point the transcript reveals appellant told the officer that he had not used any drugs or alcohol (although that fact was *not* included in the final written confession). It is therefore not surprising that drug and alcohol use was not contained in the written confession.

[4]The written confession that was introduced at trial said in part "I then, Paul Kordenbrock, pulled the trigger, aiming and firing at their heads so that they wouldn't get up."

harmless beyond a reasonable doubt. "In determining whether any particular error can be . . . classified [as harmless], this Court must review the facts and the evidence to determine the effect of the unlawfully admitted evidence upon the other evidence adduced at trial and upon conduct of the defense." *Owen*, 849 F.2d at 540 (citing *Fahy v. Connecticut*, 375 U.S. 85, 87 (1963)).

The jury was presented with the testimony of several witnesses who observed appellant either immediately before or after the shootings. Terry Hall testified that appellant arrived at a party at his sister's residence the night before the shootings "in bad condition" with red eyes, slurred speech, and appearing "kind of woozie." Trial Exhibits (TE) 4158, 4164, 4170. Gary Ramell stated that he was "spaced out" and "pretty messed up" at the party. The morning of the murders, approximately seven hours after the party, he awoke and drank two beers and took two Quaaludes, and then took another Quaalude thirty minutes later. Dr. Eljorn Don Nelson, TE 4294-95. Jeffrey Piper testified that he sold appellant ten more Quaaludes about thirty minutes before the shootings. TE 4113. He told the jury that appellant "was very high on Quaaludes," that his speech was slurred, and that his eyes were messed up. TE 4116, 4136. Gary Ramell again testified that about thirty minutes after the shootings he saw appellant and that he appeared "kind of mellow, he didn't seem like he had a care in the world," TE 3791, and that he was glassy-eyed. TE 3806. In his opening statement to the jury, appellant stated that he "shotgunned" two beers the morning of the shootings and took a Quaalude. After stopping to get gas and buy more drugs, he took two more. Appellant also told the jury that when he shot the two men, he was "standing there all messed up from the night before and what I had already consumed that morning." He told the jury that he "never intended to shoot anybody . . . [i]t just happened." The jury was thus fully aware of the degree of appellant's drug and alcohol consumption at the time of the shootings.

I fail to understand, as the majority contends, how the mere absence of a reference to drug and alcohol use in his written confession could have in any way undermined appellant's diminished capacity defense. Admission of the confession did not prevent him from putting before the jury all available evidence of his intoxication due to drugs and alcohol. The evidence supporting diminished capacity was neither contrary to, nor even inconsistent with, the statements made in his written confession. Appellant was as able to put on evidence explaining his mental state when he shot the two men as he would have been had the confession been suppressed. It seems to me logically impossible for the confession to have prejudiced his ability to make his diminished capacity defense.

This is not a situation where appellant sought to suppress a confession containing statements contrary to what he would attempt to prove at trial. For example, if appellant had *denied* using drugs or alcohol in his confession, the erroneous admission of it would undermine his defense of diminished capacity and constitute prejudicial error in the manner urged by the majority. Such would also be the case if he had stated in his written confession that he was not intoxicated or high on drugs. However, in the case before us, appellant's confession was innocuous on the matter of diminished capacity because it made no reference to drug or alcohol use at all. Failing to mention it in the confession did not render him unable to prove it at trial, nor would its absence in the written confession make it less likely that the jury would find him to have acted while intoxicated. Appellant seems really to be complaining because a confession which contained reference to drugs and alcohol would be better for his diminished capacity defense. Appellant's confession was independent of and unrelated to his ability to defend based on diminished capacity. As such, I am convinced beyond a reasonable doubt that admission of the confession was harmless error.

2. Tenor of the Confession

Even if the confession did not prevent appellant from asserting his claim of diminished capacity, the majority contends that the "cold" statement "I then, Paul Kordenbrock, pulled the trigger, aiming and firing at their heads so that they wouldn't get up," may have caused at least one juror to disbelieve that he acted with diminished capacity. I do not agree that any juror could have been influenced by the "cold" tenor of the confession in such a way. The Court again makes no reference to the uncontested testimony that appellant introduced which established his intoxication. As I view the question, the issue is whether appellant's written statement that he shot them so "they wouldn't get up" was so callous, calculating, cold, inflammatory, and prejudicial that *it* could cause any reasonable juror to *reject* all of the evidence establishing his defense of diminished capacity. Again, determining whether the error was harmless requires us to consider the effect of the illegal confession not by itself, but rather in conjunction with all of the evidence adduced at trial. *See Fahy*, 375 U.S. at 87; *Owen*, 849 F.2d at 538.

The majority's reasoning would have us assume that a juror, in the face of all the evidence and testimony indicating appellant's intoxication and diminished capacity from his recent consumption of drugs and alcohol, would reject that uncontested testimony simply because of his written statement that he shot them so "they wouldn't get up." His written statement may have been cold, as would be virtually any statement confessing a murder. While it may have been cold, however, I cannot believe that its tone was so callous and calculating that it would cause any reasonable juror to actively and affirmatively ignore the substantive evidence presented at trial which indicated he was intoxicated. I find it incredible to think that any reasonable juror could listen to all the testimony establishing his diminished capacity, and then disbelieve, reject, or ignore that evidence *because* of the language of the confession.

Appellant tempered any harshness of his written confession by his direct appeal to the jury in his opening statement and all the substantive evidence at trial showing his drug and alcohol use. Thus his written word was supplemented with an explanation of his mental state when he shot the two men. That the jury did not believe his defense cannot be logically attributed to his confession, a confession that made no reference to drug and alcohol use. Nothing he added at trial to soften the confession's tenor was even slightly inconsistent with or contrary to his written statement. Although I agree that the written confession may have appeared "cold" to the jury, I cannot agree with the majority that it was prejudicial. No juror, given all the evidence of intoxication, could have rejected the evidence out of hand because of the confession's tenor.

The majority argues, I think correctly, that "[i]f one member of the jury believed that the illegal portion of the confession . . . tended to dispel arguments in mitigation, the constitutional error was harmful." Majority Opinion at 11-12. I strongly disagree with its conclusion, however, that "[i]t is *impossible* to say beyond a reasonable doubt that no juror held such a view," or that "[i]t would be *unreasonable* to assume" that none did.[5] *Id.* (emphasis added). It is not sufficient for the Court merely to assert its conclusion and entertain the notion that a juror might have been swayed by the confession in rejecting appellant's diminished capacity defense. It is at least obliged to set forth some reason why a juror would take such a view in the face of the uncontested evidence appellant introduced.[6] *See Fahy*, 375 U.S. at 87; *Owen*,

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[5]In support of this contention, the Court points out that the jury, during sentencing deliberations, asked the trial judge whether it could impose life imprisonment with no parole, indicating that the jury was struggling with its decision. I believe the majority is reading too much into the jury's request. Mere indecisiveness or inquiry into sentencing options is hardly evidence that a juror may have been influenced by the confession.

[6]In making this statement, I am aware that the government, as beneficiary of the *Miranda* violation, must prove beyond a reasonable doubt that the violation did not contribute to the verdict. However,

849 F.2d at 540. After considering that evidence, I believe it is not only possible and reasonable to believe that no juror held such a view, but that it is reasonable beyond doubt that none did.

Far from being "the damning statements that undermined his defense of diminished capacity," Majority Opinion at 5, appellant's confession, because it did not mention drug or alcohol use, logically could not have impeded his ability to prove diminished capacity as a mitigating factor when nothing in the confession was inconsistent with that defense. Moreover, I cannot agree that any reasonable juror would disbelieve or reject all the evidence of his intoxication simply because of the tenor of the confession. I am convinced beyond any reasonable doubt that the erroneous admission of appellant's confession was harmless in the sentencing phase.

III.

Failure To Have Psychiatric Testimony

Appellant claims that since he is indigent, the Constitution entitles him to a state-funded psychiatrist to assist him in the guilt and sentencing phase of his trial. Although appellant did not assert insanity as a defense,[7]

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that does not obviate the need for the Court to articulate how, in light of the evidence presented at trial, a reasonable juror could have rejected or ignored it. Simply asserting that one *may* have rejected it is not sufficient.

[7] "Counsel for defendant Kordenbrock have never served notice of an intention to rely upon insanity as a defense. The Court believes that Kordenbrock has been afforded ample opportunity to develop such a defense if one exists." Order Denying Continuance, June 2, 1981, Judge Sam Neace, Boone County Circuit Court. Appellant's counsel testified at the District Court evidentiary hearing on the writ that appellant's sanity was never considered as a defense:

> Q: I understand that your belief was at all times that your client was not insane, nor was he incompetent to stand trial. Is that correct?
>
> A: That's my--that was my belief, and that is my belief.
>
> . . .

he hoped to use psychiatric testimony to establish a defense of diminished responsibility based on his habitual drug and alcohol abuse. He also hoped to use the same testimony for purposes of mitigation in the sentencing phase. For the reasons set out below, I agree with the District Court that appellant was not deprived of any constitutional right.

Appellant first obtained the services of a Dr. Melvin Nizny, a Cincinnati, Ohio psychiatrist. Dr. Nizny examined appellant and gave his attorneys an oral report of his evaluation. Although Dr. Nizny ordinarily did not require payment until after he had testified and even though Dr. Nizny had not submitted a bill, counsel for appellant advised Dr. Nizny that Boone County would refuse to pay his bill. Counsel knew that there was an ongoing dispute over whether the county or the state was responsible for paying experts appointed to assist criminal defendants. Counsel advised the Circuit Court that Dr. Nizny would not give a written report or testify unless he was guaranteed payment. The Circuit Court issued an order directing the Boone County Fiscal Court to pay Dr. Nizny. The Fiscal Court refused to do so. Appellant's counsel made no effort to enforce the order. The District Court found that counsel could have urged the Circuit Court to hold county officials in contempt or to levy on county bank accounts or to subpoena Dr. Nizny to testify. It further found that Dr. Nizny would have voluntarily honored a subpoena from the Kentucky court even though served in Ohio.

Dr. Nizny was never advised of the Boone County Court's order directing he be paid one half upon the filing of his report and the other half after he testified. The District Court found that counsel's failure to secure

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Q: . . . [N]ever at any time did you ever pursuant to the statutory requirements of Kentucky file a notice of your intention to claim an insanity defense, did you?

A: I--that's correct. I had no factual basis to do that.

Deposition of Edward Monahan.

payment and to have Dr. Nizny testify was a deliberate attempt to create an appealable issue. The court concluded that Dr. Nizny's evaluation would not have been useful to appellant's defense, and that his counsel was aware of it. Dr. Nizny's oral report to counsel did not indicate any mental illness. Further, appellant had revealed to Dr. Nizny that on the night before the robbery of the Western Auto store he had robbed a gas station and killed the attendant, the only witness. The unfavorable nature of Dr. Nizny's report,[8] plus counsel's failure to take any of the obvious steps to obtain Dr. Nizny's assistance, caused the lower court to conclude that appellant was not "denied" psychiatric assistance; he was merely maneuvering to create an appealable issue. *Kordenbrock v. Scroggy*, 680 F. Supp. 867 (E.D. Ky. 1988). This is a factual finding made after an extensive evidentiary hearing which can be set aside only if clearly erroneous. *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 616 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Upon examination of the record, I am not persuaded that a mistake had been made. ("A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

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[8]The District Court also found that Dr. Nizny's preliminary report was also unfavorable in that he found appellant had an "anti-social personality," that is, he had no regard to the rights of his fellow man or woman. Also, Dr. Nizny concluded and reported that "it could not be said that rehabilitation was probable." *Kordenbrock v. Scroggy*, 680 F. Supp. 867, 872 (E.D. Ky. 1988). The majority state that Dr. Nizny's report "indicates that Kordenbrock was not 'a man totally self centered or totally devoid of feeling for another person.'" Majority Opinion at 28. What the report says is:

> I found him trying, in an adolescent way, to please and to assume responsibility. For example, the weekend before the event in question, he cleaned his uncle's barn of manure in exchange for room and board; I do not believe that one would consider *this action* that of a man totally self centered or totally devoid of feeling for another person. Then again, he described being preoccupied with dog footprints on his car and had promised his girlfriend that he would have it washed. After the crimes, he described attention to this but none to his victims.

(Emphasis added.)

has been committed.") *Id.* The Court holds clearly erroneous the district judge's finding that appellant's counsel did not want Dr. Nizny to testify because, it says, his finding was based on the erroneous assumption that the state court, if Nizny had testified, would have required disclosure of the fact that appellant had robbed, shot and killed the gas station attendant the night before. Although the murder the night before was one of the unfavorable aspects of the report which caused the district judge to conclude defense counsel did not want him as a witness, it was not the only one. Moreover, in larger degree, I agree with the district judge's statement made during arguments before him and quoted in the majority opinion that "any judge would have let the prosecution question Dr. Nizny on this [shooting] issue." Although the information was prejudicial, it was also highly probative. Certainly the fact could not be concealed from the prosecution. If Dr. Nizny were to testify that appellant probably shot the store employees because he was startled when the glass broke rather than because he wished to eliminate them as witnesses or just wanted to murder them, would not the fact that he had shot the gas station attendant the night before be the most probative evidence to test fallaciousness in the doctor's opinion? Surely, Dr. Nizny would have had to take into account the prior killing in reaching any opinion on rehabilitation. The likelihood of the evidence being admitted is, in my opinion, almost a certainty. Moreover, the Court's inference that counsel did not want Dr. Nizny as a witness does not depend on the certainty that the evidence would come in, but the likelihood. It was on this likelihood that counsel would make their decision. Although I do not condone the state's refusal to pay Dr. Nizny, I find no constitutional violation.

Counsel's further efforts to secure another psychiatrist failed. The case was again continued (it had previously been continued when Dr. Nizny was unavailable) and the trial court ordered appellant to be examined by a psychiatrist at a state institution who could assist in appellant's defense.

Pursuant to that order, appellant was seen on November 21, 1980, by a Dr. James Bland of Forensic Psychiatry Services, a public hospital operated by the Kentucky Department of Human Resources. Dr. Bland was to examine appellant on the issue of his competency and sanity. Because the state restricted such experts to a neutral and objective evaluation concerning only competence to stand trial and sanity, and because he feared that Dr. Bland's opinion might not remain confidential, appellant's counsel advised him not to cooperate.

On May 15, 1981, appellant requested and was granted the appointment of a Dr. Michael Gureasko to act as a defense psychiatrist. However, on May 18th, Dr. Gureasko called the court and told it he would not assist appellant because of a misunderstanding with counsel. The court denied appellant's motion for a further continuance and the case was tried.

Appellant relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985) for his claim that the Constitution guarantees him a court-appointed psychiatric expert to assist in his defense and in the penalty phase of trial. *Ake* held that:

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. The Court qualified this right:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent

psychiatrist for the purpose we have discussed . . . .

Id. Appellant claims his constitutional rights were violated because the county refused to pay for Dr. Nizny's services and because the state-funded expert offered, Dr. Bland, was limited to determining appellant's competence and sanity, and could not make an evaluation concerning his diminished responsibility or other mitigating factors.

However, appellant's claim that the scope of Dr. Bland's examination and testimony was too limited to be effective is without merit. Dr. Bland testified at the evidentiary hearing in the District Court that he could have addressed all of the psychiatric issues appellant's counsel wanted Dr. Nizny to address.[9] Moreover,

[9]Dr. Bland was a physician specializing in psychiatry. He testified that he would have been able to examine all areas of appellant that Dr. Nizny was requested to examine:

> Q: Are any of the [nineteen] questions posed in the letter from Mr. Monahan [appellant's trial counsel] to Dr. Nizny . . . in that September the 8th, 1980, correspondence that you would have been prohibited, unable or unwilling to address, had you been able to examine and had Mr. Kordenbrock cooperated with you?
>
> A: I can't say that I would be able to answer all of them in any substantial way. That would depend on a lot of factors. But I don't see any here that I wouldn't be able to address. And in fact they're the types of questions that are commonly asked in trial proceedings regarding my testimony.
>
> Q: All right. Those questions are commonly posed questions in cases where mental capacity or mental illness might be an issue?
>
> A: Yes.
>
> . . .
>
> THE COURT: Turn particularly to number 11, what statutory and otherwise mitigating factors exist in Paul's commission of these offenses? Would you have been able to consider that and testify on that if you had come up with some--if they had come up with something favorable to the defendant?
>
> THE WITNESS: Yes.

appellant's objection that Dr. Bland was neutral and therefore could not give effective defense assistance is without merit. *Ake* merely requires that a *competent* psychiatrist be provided to assist indigent defendants, not the psychiatrist of their choice. 470 U.S. at 83. Appellant's argument that Dr. Bland was not required to examine him at his counsel's direction is belied by Dr. Bland's stated willingness to pursue the examination along a course plotted by defense counsel:

> Q: . . . Would you have--would you have if directed by the court engage in any other matter

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> . . .
>
> THE COURT: What about number 15, can Paul be rehabilitated? Could you have given the jury in the sentencing phase an opinion on that?
>
> THE WITNESS: That was not an unusual question to be asked, your honor. Yes, I could have.

Testimony of Dr. Bland. Dr. Bland was also prepared to investigate and testify as to appellant's family history and psychological background:

> Q: As part of your mental--your examination of an accused, Doctor, during this period is a thorough history taking important?
>
> A: Yes.
>
> Q: Would you include in that history as part of your opinions effects of any drugs or alcohol which the defendant might use either chronically, or on the occasion of the crime or on the occasion of a subsequent confession to the crime?
>
> A: Yes. That would be part of the history.
>
> . . .
>
> Q: And would you have been prepared to testify, Doctor, if called by the defense if you found there to be any effects of any of those things with respect to any of your opinions as to the capacity of an individual?
>
> A: Yes.
>
> Q: Likewise, family background, intelligence and other environmental factors?
>
> A: Yes, that would be considered.

Id.

which the--defendant's attorneys might ask you to pursue, if ordered by the court?

A: Yes.

Q: Regardless of the amount of time which it might take?

. . .

A: Yes, I would.

Testimony of Dr. Bland. Dr. Bland also stated that his neutral, objective evaluation would have supplied appellant with any information that appellant could use in his defense:

> THE COURT: But you would have made the evaluation and called it either way you saw it. You would have made the evaluation. If you thought he was crazy with drugs and irresponsible from the drugs, or couldn't form the criminal intent from the drugs, or form a mitigating circumstance, or anything in his family background were a mitigating circumstance you would have just reported like you saw it, right?
>
> THE WITNESS: I would have just reported it as I saw it and also gave an interpretive opinion about how that might have or might not have in my opinion affected the situation.

Id.

I am unpersuaded by the majority's appeal to Dr. Bland's statement that he would be available as an expert "in a limited way." Although it is true that his investigation "might not and potentially would not include the depth of areas that might be pursued by a defense-only psychiatrist in terms of looking for everything possible in favor [of] the defendant," such an expert is not required

by *Ake*. Appellant is requesting, and the majority would grant, only the very best defense expert. However, *Ake* requires at most only a competent psychiatrist to "assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. Dr. Bland's testimony shows he could have and would have provided the necessary assistance.

I agree with the District Court that Dr. Bland's assistance, had appellant taken advantage of it, would have met *Ake*'s command of guaranteeing appellant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* I also agree that as a matter of strategy appellant chose not to avail himself of this witness. His concern over confidentiality could have been met by a court order. The trial court evidenced a cooperative attitude to provide appellant with the service of a psychiatrist.

Appellant's constitutional rights under *Ake* were not violated. *Ake*'s guarantee of a state-funded psychiatrist arises only after defendant shows that his sanity will be "a significant factor at trial." *Id.* *See also Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990); *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1986); *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986); *Bowden v. Kemp*, 767 F.2d 761 (11th Cir. 1985). Appellant never attempted to raise insanity as a defense. At most he sought to show that his capacity was diminished through drug and alcohol use, thus depriving him of the specific intent necessary to convict him of intentional murder. Although *Ake* does not establish a bright line test for determining when a defendant has demonstrated that "sanity at the time of the offense will always be a significant factor," it is clear that "'*Ake* requires that the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case.'" *Cartwright*, 802 F.2d at 1211-12 (quoting *Volson*, 794 F.2d at 176). Such a showing is not made by merely positing that appellant was a habitual drug and alcohol abuser. *See Pedrero v. Wainwright*, 590

F.2d 1383, 1391 (5th Cir.) (pre-*Ake* case holding that insanity is not made an issue by showing defendant was a drug addict entitling him to state-funded defense psychiatrist), *cert. denied*, 444 U.S. 943 (1979).

Finally, even if the state court did improperly deny appellant access to Dr. Nizny, I agree with the District Court that his constitutional rights under *Ake* were adequately protected by the testimony of Dr. Eljorn Don Nelson. Dr. Nelson taught pharmacology at the University of Cincinnati College of Medicine and directed the college's drug and poison information center. He teaches medical students, physicians and psychiatrists about the diagnosis and treatment of drug and alcohol abuse. He had received special training in the area of psychopharmacology. It is again important to note that appellant admittedly never made his *sanity* an issue--he only sought to establish diminished capacity and the inability to form specific intent because of drugs and alcohol. At trial, Dr. Nelson testified that he had examined appellant and detailed his long history of drug and alcohol abuse. He then testified specifically about appellant's mental state at the time of the crime:

> Q: Doctor, do you have an opinion as to Paul Kordenbrock's ability to fully control his actions at 9:30, Saturday, January 5th, 1980, based on . . . information about his level of drugs?
>
> A: I think that Paul Kordenbrock was under the influence of alcohol and/or Diazapam and/or Phencyclidene and I think he, probably, as a result of that had a diminished ability to exercise judgment, ethical decisions, and formulate complex thoughts. I think he was basically, in lay terms, he was drunk and stoned. That is my opinion.
>
> Q: . . . [D]o you have an opinion as to whether or not Paul Kordenbrock was psychologically and

> physically addicted to drugs at 9:30 on Saturday, January 5th, 1980?
>
> A: I think he was physically and psychologically addicted to alcohol. If the street tablets contained Diazapam he was certainly psychologically and physically dependent to that.

Testimony of Dr. Nelson. Dr. Nelson's testimony went to the heart of appellant's defense. On appeal, appellant fails to establish how Dr. Nizny's testimony would differ or add to Dr. Nelson's testimony. Although he claims that Dr. Nizny's testimony would have explained to the jury why appellant behaved the way he did, it appears that Dr. Nelson's examination and testimony were sufficient to establish the defense of diminished responsibility and mental capacity. Simply asserting that Dr. Nizny's testimony would have been beneficial is not enough. "Where a defendant offers 'little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision [to deny psychiatric assistance].'" *Bowden*, 767 F.2d at 765 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)). Appellant's defense was not that he was insane or mentally diseased--it was only that drugs and alcohol affected his ability to formulate specific intent and should have been used for mitigation in his sentence. Therefore, I agree with the District Court that any error in denying access to Dr. Nizny was harmless to the extent that Dr. Nelson examined appellant and testified to the same issues. Appellant's constitutional rights under *Ake* were not violated.

Lastly, *Ake*'s guarantee of access to psychiatric counsel in the sentencing phase of trial does not apply to these facts. *Ake*'s guarantee applies in two situations--when the defendant's sanity is a significant factor at trial and "in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness." *Ake*, 470 U.S. at 83. *Ake* only

guarantees a defendant the right to a psychiatrist at the sentencing phase to oppose the government's psychiatric testimony. The Supreme Court explained that the need for a defense psychiatrist arises only when the government uses an expert because "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's *opposing* view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the *State's proof of an aggravating factor.*" *Id.* at 84 (emphasis added). In *Bowden*, the court stated that "[u]nlike the sentencing situation in *Ake*, Bowden's prosecutor had no need to present psychiatric evidence to show an aggravating factor, and he presented none. The dangers and inequities which concerned the Court in *Ake* consequently did not exist." 767 F.2d at 764 n.5. Nor do those dangers and inequities exist in this appeal. The state presented no psychiatric experts at the sentencing phase, only a doctor who was a general family practitioner who testified about the effects of drugs. As such, appellant was not constitutionally entitled to a state-funded psychiatrist under *Ake*. In addition, the testimony given by Dr. Nelson went to the effects of his drug and alcohol abuse and could be used for purposes of mitigation and to counter the state's witness.

IV.

Jury Instruction Re Unanimity

Nor can I agree with the majority opinion that appellant's constitutional rights were violated when the trial judge instructed the jury in the penalty phase that an *aggravating* factor had to be found unanimously, but was silent with regard to how many had to agree in finding a mitigating factor. Appellant claims this caused the jury to mistakenly believe that finding a mitigating factor also required unanimity. In reviewing this claim, I first note that errors of instruction are not reviewable in a habeas proceeding unless they work to deprive appellant of due process. *Long v. Smith*, 663 F.2d 18 (6th Cir. 1981), *cert. denied*, 455 U.S. 1024 (1982). The standard for

determining this is "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" not merely whether it is erroneous. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). It is clear that the instructions given here did not "infect[] the entire trial" and deny appellant due process.

As the District Court held, there is nothing in the instructions that would lead the jurors to believe that finding a mitigating factor required unanimity. The instructions carefully stated that finding an *aggravating* factor required such agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed it would indicate the opposite. The instructions were not misleading.

Kubat v. Thieret, 867 F.2d 351 (7th Cir.), *cert. denied*, 110 S. Ct. 206 (1989) relied upon in the majority opinion, is clearly distinguishable from the instant case. Unlike silence, the jury there was specifically told that they must find mitigating factors unanimously.

> If, after your deliberations, you *unanimously* determine that there is no sufficiently mitigating factor or factors to preclude the imposition of the death sentence on the defendant, ...
>
> If, after your deliberations, you *unanimously* conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence, ...

Id. at 369 (emphasis added and in original). Although another instruction permitted the jury to so state if they were unable to reach a unanimous verdict, that could not correct the erroneous instruction.

I therefore conclude that the instruction did not deprive appellant of due process or invade any constitutional right.

BOYCE F. MARTIN, JR., Circuit Judge, concurring in part and dissenting in part. I concur in the majority's opinion reversing Paul Kordenbrock's conviction and sentence on the grounds set out in parts II-IV of the opinion. However, on the remaining issues, I have additional comments and/or a slightly different analysis of the issues. Thus, I write separately on each of the remaining parts of the opinion.

V. Miscellaneous Claims

I agree with the majority's treatment of issues B., C., and D. As to issue E., I believe that the police's action of displaying the pill bottle before Kordenbrock during interrogation was intentionally manipulative. I also believe that the police's oh-so-convenient loss of the pill bottle and erasure of the tape are inexcusable bungles for courts to tolerate in capital cases.

As to Issue A., I disagree that the standard announced in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), was satisfied. In *Caldwell*, the Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lay elsewhere." *Caldwell*, 472 U.S. at 328-29. In *Caldwell*, the Court dealt with a prosecutor's inaccurate statements to a jury regarding its sentencing responsibilities. This case is unique because while the prosecutor accurately informed the jury that the Kentucky capital sentencing law in effect at the time of Kordenbrock's case requires a jury to "recommend" the sentence in a capital sentencing proceeding, the statute itself did not accurately reflect the *de facto* sentencing responsibility of the jury which was to fix the sentence.

In cases where the term "recommendation" has been upheld for jury instructions informing the jurors of their sentencing function, the states involved actually limit the jury's function to giving a non-binding recommendation to

the trial judge. *See, e.g., Harich v. Dugger*, 844 F.2d 1464, 1473-74 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1355 (1989) (Florida); *see also* Project, Nineteenth Annual Review of Crim. Proc.: United States Sup. Ct. and Cts. of App. 1988-89, 78 Geo. L. J. 669, 1294 n.2747 (1990) (noting that Florida, Alabama, and Indiana use a jury recommendation system as an advisory opinion for trial judge). The Kentucky sentencing statute in effect at the time Kordenbrock was sentenced mischaracterized the binding nature of the jury's decision as a "recommendation" when in fact the jury fixed the penalty as either life or death. Consequently, the capital sentencing jury instructions were amended by the Kentucky Supreme Court in *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. Sup. Ct. 1988), to accurately state the jury's role.

Most courts have held that *Caldwell* focuses solely on the prosecutor's statements regarding the applicable sentencing law and that there must be a misstatement regarding that law for a *Caldwell* violation to have taken place. Yet, *Caldwell* speaks in broader terms, holding that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." *Caldwell*, 472 U.S. at 328-29. The fact that the words of the Kentucky statute are inaccurate, not the prosecutor's instructions, is immaterial because the harm and constitutional deficiency stem from the jurors' false perception of their sentencing responsibility.

The standard for a challenge to the jury instructions themselves was set out in *Dugger v. Adams*, ___ U.S. ___, 109 S. Ct. 1211 (1989). The Court held that the defendant "necessarily must show that the remarks made to the jury improperly describe the role assigned to the jury by local law." 109 S. Ct. at 1215. Here, the fact that the Kentucky statute was accurately described does not mean that in application, the law was constitutional. The statute clearly gave the jury a false sense of its actual

responsibility--thus necessitating the Kentucky Supreme Court's amendment, in *Tamme*, of the statutory instructions. In *Dugger*, the Court declined to reach the issue because the defendant failed to object to the allegedly improper instructions. Interestingly, the Court referred to the issue as a *Caldwell* issue despite the fact that it was a jury instruction issue, not a prosecutor's statement issue--supporting my view that *Caldwell* applies to misleading jury instructions as well. Consequently, I believe that this case presents the highly unusual situation where an accurate description of the capital sentencing statute is unconstitutional because Kentucky's statute inaccurately described the jurors' actual role.

VI. Refusal to Provide Psychiatric Expert for the Defense

A. Applicability of *Ake v. Oklahoma*

I join Chief Judge Merritt's dissent on this issue. The question is whether *Ake v. Oklahoma*, 470 U.S. 68 (1985), is limited to providing an indigent defendant with a psychiatric expert for presenting only a sanity-related defense. I believe that such a limitation on *Ake*'s holding is an unusually myopic reading of the reasoning in that opinion.

I fully agree with Chief Judge Merritt's analysis of this issue. The extension of *Ake* beyond the sanity issue is supported both by Justice Marshall's *Matthews v. Eldridge*, 424 U.S. 319 (1976), due process analysis in *Ake* and by the lower federal courts and state courts that have recognized that *Ake* stands for the proposition that the state must furnish the defense with the "basic tools" for an adequate defense. *Ake*, 470 U.S. at 77; *see, e.g., Little v. Armentrout*, 835 F.2d 1240, 1243 (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (1988) (holding that *Ake* required even non-psychiatric experts); *Moore v. Kemp*, 809 F.2d 702 (11th Cir.) (en banc), *cert. denied*, 481 U.S. 1054 (1987); *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987) (defendant entitled under *Ake* to expert

on intoxication defense); *In re Allen R.*, ___ N.H. ___, 506 A.2d 329 (1986) (*Ake* entitled defendant to mental health expert on issue of defendant's competency to waive *Miranda* rights); *but see State v. Massey*, 316 N.C. 558, 324 S.E.2d 811, 816 (1986) (defendant not entitled to expert on competency to waive *Miranda* rights); *Stafford v. Love*, 726 P.2d 894 (Okla. 1986) (*Ake* limited to psychiatric experts only); *Ex parte Grayson*, 479 So.2d 76 (Ala.), *cert. denied*, 106 S. Ct. 189 (1985) (*Ake* limited to psychiatrists and the insanity defense). I believe that under Justice Marshall's due process/fundamental fairness analysis, *Ake* provides for experts on issues other than sanity.

Moreover, I believe that Kordenbrock's right to an expert for his diminished capacity defense is equally cognizable under his equal protection clause argument. In a pre-*Ake* state habeas case, the Fourth Circuit held that the equal protection clause required the state to provide expert assistance for a criminal defense "when a substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance." *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980). This right, according to the court, was "firmly based on the equal protection clause." *Id.* at 1026. There, the request was for a pathologist to assist the defendant's argument that a gunshot wound did not cause the victim's death. The court held that the equal protection clause required the appointment of the pathologist. I believe Kordenbrock satisfies the standard in *Williams v. Martin* and that his entitlement to an expert is solidly established under the equal protection clause as well as under the due process reasoning in *Ake*.

I agree with Chief Judge Merritt that Kordenbrock's counsel cannot be found to have manufactured an appealable issue by "deliberately failing to secure payment for an expert."

I also concur with Chief Judge Merritt's reasoning that *Ake* requires more than a "neutral" expert. The language of the majority opinion and dissent in *Ake* shows that the expert was deemed to be a defense expert. While *Ake* does not give the defendant the expert of his choice, it does indicate that the defense is entitled to an expert "who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense.*" *Ake*, 470 U.S. at 83 (emphasis supplied). The tasks of the defense psychiatrist were described as "to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82. It is clear that the *Ake* majority did not contemplate a neutral psychiatrist as satisfying due process. Indeed, Justice Rehnquist assailed the majority in his dissenting opinion for establishing the right to a "defense consultant." *Id.* at 87. Moreover, in *Ake*, the Court all but overruled *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), where the state had supplied neutral psychiatrists.

The reason for a partisan witness is clear. Dr. Bland, the state psychiatrist, testified before Judge Bertelsman at the habeas hearing that he could not pursue theories desired by the defense, assist their cross-examination, nor guarantee confidentiality to the defense. As stated by the Tenth Circuit, the Court's duty to appoint a defense expert under *Ake* "cannot be satisfied with appointment of an expert who ultimately testifies contrary to the defense. . . . The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985); *see also United States v. Crews*, 781 F.2d 826, 833-34 (10th Cir. 1986)(despite testimony of four treating or court-appointed psychiatrists, defendants was entitled to his own psychiatrist to aid in the interpretation of the experts' finding and to assist in cross-examination); *but see Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.

1986)(court upheld denial of defendant's request for independent expert where three of the state's six expert's testified in favor of the defense). In *Magwood*, the court overlooked the fact that presenting testimony is only one of the many functions of the psychiatric expert and the defendant was deprived of the assistance of cross-examining the defense experts. The use of an impartial expert subverts the adversary process by making a single expert the ultimate decider of the issue. The jury or judge can only make a principled decision when there is a "battle of the experts" where truth is more likely to emerge through each side presenting its own case. With a "neutral" expert, the defense cannot really challenge the findings of adverse testimony because that expert is the only one available to the indigent defendant. Moreover, a potential for conflict of interest emerges when a state agency uncovers incriminating evidence--is its duty to the defendant or to the public? While a defendant is not entitled to an expert who will testify to the issues in a way that the defendant wishes, the expert must be "partisan" in the way a retained expert would provide assistance to the defense. *See generally* Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of *Ake v. Oklahoma*, 84 Mich. L. Rev. 1326, 1349-54 (1986); Comment, Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-*Ake* Criminal Justice System, 37 Emory L.J. 995, 1008, 1018-22 (1988).

Recently, the Fifth Circuit held that *Ake* was not violated by court appointment of a psychiatrist whose examination report to both the defense and prosecution. *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3752 (5/27/90). In a dissent from the Court's denial of certiorari, Justice Marshall, *Ake*'s author, joined by Justice Brennan, blasted the decision as unfaithful to *Ake*'s clear requirement of a partisan expert--not a "disinterested" expert. I believe that Justice Marshall's dissent, although obviously not a majority opinion, is a particularly persuasive comment on *Ake*'s requirements since he is that opinion's author.

I concur in Chief Judge Merritt's analysis of the issues concerning whether a pharmacologist satisfied *Ake*. I also join in Chief Judge Merritt's analysis of the jury instructions regarding the jury's consideration of mitigating factors in Part VII of the opinion.

KRUPANSKY, Circuit Judge, dissenting. I join in Judge Kennedy's dissenting opinion with the following comments.

As the district court and the dissenting opinion observed, the absence of Dr. Nizny's appearance and the testimony during the state trial and sentencing proceedings was a calculated defense strategy implemented by astute legal counsel who, from the outset, perceived and recognized the callous implications of the appellant's action when, during the course of a planned robbery, he killed Stanley Allen and attempted to kill William Thompson by deliberately shooting each of them, in the back of the head, after ordering them to lie face down on the floor of a storage room at the rear of the Western Auto Store in Florence, Kentucky, where both men worked.

Challenged by the malevolence of the appellant's actions, which were confirmed by the psychiatric examination and oral evaluation of Dr. Nizny, a respected psychiatrist of appellant's choice, counsel implemented a course of trial tactics designed to induce error into the record for purposes of appeal, a result they successfully accomplished. The district court's conclusion that defense counsels' deliberate efforts insured against Dr. Nizny testifying in appellant's defense was firmly supported by the evidence and is not clearly erroneous.

It is conceded by the defense that appellant has never alleged nor had he placed insanity in issue before the Boone Circuit Court of Kentucky (Circuit Court) or subsequent courts. It should also be noted that appellant's request for funds to retain a psychiatrist of his choice was nevertheless granted.

The first of three psychiatrists to examine appellant was Dr. Warner W. Anderson. In evaluating appellant's competency to stand trial and his mental state at the time of the robbery and shooting, Dr. Anderson concluded:

> I could find no evidence from the examination that this man suffers from any mental illness . . . . He could *not account for anything including drugs* that would have altered his mental state on the day of the alleged murder . . . . He did not appear to be remorseful about the fact that he had taken someone's life . . . . The *history that he presented suggested a series of episodes indicating antisocial behavior.* He is aware of the seriousness of the charges against him and is aware that the possible consequences could result in his being executed in the electric chair. I feel he is capable of assisting counsel in his own defense. (emphasis added).

On or about May 14, 1980, at the Circuit Court's suggestion, defense counsel inquired into the availability of qualified psychiatrists at various state facilities, particularly the Grauman Forensic Psychiatry Unit (Forensic Psychiatry Services) who were available to provide "an objective evaluation" for both competency or the existence of a mental disease, defect, or condition at the time of the alleged criminal act. Subsequent to further communication with Grauman, defense counsels' request to participate in appellants defense was declined because "this department cannot allow itself to be used as the tool for either side in criminal matters but must maintain an objective stance."

Subsequent to an in camera hearing conducted on July 18, 1980, the Circuit Court authorized defense counsel to select and employ a psychiatrist, a psychologist, and a psychopharmacologist of their choice whose fees would be paid by the state. On August 15, 1980, defense counsel advised the Circuit Court that after discussing the desired psychiatric evaluations and related expert opinions concerning appellant's diminished capacity immediately before and during the robbery with 16 psychiatrists and 8 psychologists, all "refused to assist the defense."

However, on August 26, 1980 defense counsel notified the Circuit Court that they had selected and retained Dr.

Melvyn Nizny as their psychiatric expert of choice. On October 6 and 13, 1980, defense counsel, in support of appellant's motion for a continuance, advised that Dr. Nizny's report would not be available until November 5, 1980, and that defense counsel had agreed to pay Dr. Nizny one-half of his fee upon submission of his written report, the balance to be forthcoming at the conclusion of his testimony, although it was Dr. Nizny's policy to submit fee schedules only after he had concluded his examinations, evaluations, submitted a written report and testified at trial. Dr. Nizny had not suggested or requested defense counsels' payment arrangement.

Defense counsel also alerted the Circuit Court that the Boone County Fiscal Court (Fiscal Court) would probably refuse to pay Dr. Nizny because of a jurisdictional controversy between it and the State of Kentucky over which political subdivision was responsible for payment of expert fees in criminal cases, which ongoing controversy would require the commencement of a mandamus action necessitating the postponement of appellant's scheduled trial on November 6, 1980. At the conclusion of the hearing the Circuit Court ordered the Fiscal Court to pay Dr. Nizny's fees and continued the trial of November 6, 1980.

With this reflection of historical circumstances surrounding defense counsels' "efforts" to obtain psychiatric assistance on behalf of appellant, the United States District Court for the Western District of Kentucky noted that on November 6, 1980, *after* Dr. Nizny had examined the appellant and orally reported to defense counsel, that his psychiatric examinations of the appellant reflected no mental illness and that, during the course of extended interviews, appellant had disclosed that on the night before the murder of Allen and the attempted murder of Thompson during the robbery of the Western Auto Store he had killed a service station attendant while robbing a Star Service Station in Kentucky. He also told Dr. Nizny that after the murder he visited his girlfriend where he met Michael Kruse and partied with three

women until the following morning. Dr. Nizny opined to defense counsel that as a result of his three examinations of the appellant he concluded that the appellant had "an antisocial personality," with no regard for the rights of his fellow human beings and that "it could not be said the rehabilitation [of Kordenbrock] was probable."

Confronted with this highly prejudicial and damaging evidence, which would have become available to the state through the cross-examination of Dr. Nizny,[1] defense counsel promptly notified Dr. Nizny that the Fiscal Court had refused to pay his fees and that in all probability would not compensate him for his professional services as promised and that defense counsel could not guarantee payment. Contemporaneously, defense counsel told the Circuit Court that Dr. Nizny would not submit a written report and would refuse to appear as a defense witness until he was paid or guaranteed payment of his fees.

It is noteworthy that although the Circuit Court had ordered the Fiscal Court to honor and pay the professional fees of Dr. Nizny, which decree was ignored, defense counsel made no effort to enforce the Circuit Court's order by proceeding in contempt or to otherwise levy upon county bank accounts or to request or subpoena the doctor to testify in person or by deposition.

Also reflecting upon defense counsels' "good faith" efforts to present Dr. Nizny as a witness is the doctor's disclosure that he had never been informed of the Circuit Court's order directing his fees be paid, and his assertions that he would have voluntarily appeared as a witness if requested even though he was beyond the subpoena jurisdiction of the Kentucky Circuit Court and even though he had not been paid.

On November 21, 1980, the Circuit Court ordered appellant to the Forensic Psychiatry Services for

[1]The dissenting opinion has fully discussed the relevancy and admissibility of Dr. Nizny's adverse trial testimony.

evaluation because defense counsel had been "unsuccessful in their efforts to procure the services of a psychiatrist of their own choosing, and the trial of this cause having been unduly delayed because of the lack of such expert assistance." Defense Counsel immediately directed appellant "not to communicate with the psychiatrist as long as Forensic is not acting as our full-fledged defense psychiatrist."

On April 22, 1981, trial was scheduled for June 16, 1981. On May 6, 1981, defense counsel requested the appointment of Dr. Michael Gureasko, another forensic psychiatrist of their choice, which request the Circuit Court granted on May 15, 1981. On May 18, 1981, a defense motion for continuance was filed supported by the affidavit of Dr. Gureasko. On the same day Dr. Gureasko telephoned the Circuit Court to request the withdrawal of his affidavit and of his decision not to participate in the case due to a "disagreement or misunderstanding with defense counsel." The motion for continuance was denied and the case proceeded to trial.

The related sequence of events reflects an objective manifestation of defense counsels' efforts to discourage any objective psychiatric examination, evaluation, or testimony on behalf of the appellant, which had all the appearances of psychiatric shopping. In *Harris v. Vasquez*, 913 F.2d 606, 620-21 (9th Cir. 1990), which was a case of equal premeditation and brutality, the appellant's psychiatric profile revealed an "anti-social personality" without remorse or the "ability to profit from past experience or punishment." The Ninth Circuit rejected the argument that appellant was denied access to qualified psychiatric assistance because the defense, for tactical reasons, much like this case, suppressed the testimony of two psychiatrists of appellant's choice. Thus, I concur with the district judge and the dissenting opinion in the conclusion that defense counsel deliberately induced error into the record for purposes of appeal and that Dr. Nizny's failure to appear at appellant's trial did

not, under the circumstances of this case, constitute a constitutional infringement.

The subtle sagacity and effectiveness of defense counsels' tactics in implementing appellant's defense strategy is again demonstrated by their decision to have the defendant personally address the jury by reading a prepared and obviously tailored opening statement which emotionally described his physical and mental condition as impaired by heavy and continuous drug and alcohol consumption the night before and immediately preceding the Western Auto Store robbery.

The result of defense counsels' adroit legal maneuver is apparent from the expressed concerns of at least two of my associates who have become troubled by the stark contrast between the appellant's signed confession which was read to the jury "as a simple, direct, calm, and confident recitation of cold-blooded murder....entirely devoid of any reference to alcohol or drug use, any suggestion of hesitancy to act or confusion of purpose, or any tinge of regret" and the defendant's opening statement at trial wherein he detailed a "narrative of heavy and continuing drug and alcohol consumption immediately preceding the killing, an abbreviated description of the robbery and shooting in language thinking of uncertain purpose, and then an explicit denial of an intent 'to shoot anybody.'"

The reason for the disparity is obvious from a review of the verbatim transcript of appellant's interrogation conducted immediately subsequent to his arrest which Judge Nelson, in a concurring opinion, characterized in the following language:

> The appellant's exercise of his right to remain silent produced no untoward consequences at all. There was no exercise of physical force, no threat of physical force, no hint of physical force. The verbatim transcript of the interrogation does not suggest that the police ever lost their tempers, or

> even so much as raised their voices. If I had been a prosecutor in this case, I daresay I would have been quite content to have a videotape of the questioning shown in open court.
>
> At no point did the police try to get the appellant to shade the truth in any way. After the appellant said that he was the one who pulled the trigger, for example, the questioner said "Don't jack us[;] if you didn't [do it] tell us[;] if you did[,] tell us." There is no reason at all to doubt the sincerity of the appellant's response, which was "Sir, I did it, I told you." This is simply not a case where the police were trying to browbeat a suspect into confessing to a crime that he might not have committed.
>
> The interrogation was not prolonged unreasonably; the verbatim transcript takes less than 40 typewritten pages, with a new line for the start of each question and each answer. There is no indication that the appellant was deprived of food or drink or bathroom privileges. When he wanted a cigarette, he was given a cigarette. When he asked for an exercise break, he was given an exercise break. This is a long way indeed from the rubber hose or the rack and thumbscrew.

The interrogation reflects that for two and a half hours two interrogating officers cajoled, solicited, urged, coaxed, and requested appellant to explain or offer some reason for the murders which appeared to have been perpetrated in a cold, calculated manner. Not during this entire period, apart from expressing a need for money to pay hospital bills, did the appellant once, directly or indirectly state or infer that he was confused, irrational, hallucinating or in any way physically or mentally incapacitated by fatigue, the ingestion of drugs or alcohol or any combination thereof when he shot his victims in the back of the head while they were helplessly lying faced down on the floor.

My colleagues, in discussing their troubled concerns avoid, *sub silentio*, appellant's *unequivocal denial of having ingested any drugs, or alcohol or being confused, spaced-out, or irrational from fatigue, drugs, or alcohol during the morning of and at the time he shot his victims.*

The colloquy which could be considered pertinent to the defense of diminished capacity resulting from drug or alcohol is concise and certainly dispositive of the expressed concern arising from the disparity between the appellant's signed confession and his opening statement.

Q: Were you taking some kind of drugs or something, were you out of it?

A: No, Sir.

Q: Were you mentally worn out, you really didn't know what you were doing? Had you been up for 3 or 4 days worrying yourself sick over your hospital bills?

A: Just know I needed money to pay bills.

* * *

Q: It's been done and you can't undo it. We just like for you to cooperate and tell us why it happened (inaudible) there's bound to be some damn reason behind this crazy thing. People just don't do that, you just don't get that way over night, there's bound to be something that made you do it or got you to go that far, you know.

Was you numb Paul?

A: What?

Q: Was you numb?

A: Numb. No, sir, I wasn't.

Moreover, the signed confession which contains the totality of his material disclosures made during his interrogation is the statement that he read, acknowledged, and was willing to sign at the conclusion of the inquiry.

The answer to Judge Nelson's musings that "at an emotional level -- and jurors do have emotions -- I think it [the exclusion of selected disconnected phrases from appellant's interrogation from his written confession] could have tipped the scales" is also apparent from a review of the verbatim transcript of that quest for information.

Read in context, when appellant stated he was "scared shitless" he was not referring to a confused, irrational state of mind, panic, or other form of diminished capacity he experienced immediately before, during, or after the murders that had been induced by fatigue, drugs, or alcohol. He was expressing a calculated fear of being identified and returned to prison at some future time either as a probation violator or as a participant in the instant robbery.

Q: Are you still on probation down in Covington?

A: Yes, sir.

Q: How long?

A: How much longer?

Q: Yeh.

A: Two more years.

* * *

Q: Paul, we're going to find all this stuff out, it's just a matter of time, look how much we've

already dug up and in a way the body ain't even cold, you know that, just a matter of time, all the people we've got out working right now.

Paul, did those guys put up any kind of a struggle with you?

A: The one guy started to get up when the customer came in.

Q: Did you think he was going to get up and fight you or something?

A: I didn't know.

Q: Did that scare you?

(no answer)

Q: Was you afraid of going back to jail that much that you had to shoot him? Did you fear it that much?

A: Well, I was scared shitless.

The remaining omissions from the confession of concern to Judge Nelson related to the events immediately preceding the shootings while the appellants view of the retail area from the rear storage room where he was holding his victims at gunpoint was totally obscured. Shortly after directing Thompson into the storeroom where the clerk Allen was cleaning shelves, he ordered both men to lie face down, head to head, in a 9 o'clock position, he then heard a customer enter the store and an audible conversation between his accomplice and some unknown person. Obviously "he didn't know what was happening" in the retail area until after he heard the customers leave the store when it was "too late".

The isolated extrapolations from various pages of the interrogation transcript which the appellant adamantly refused to clarify during persistent importuning by his interrogators appear as meaningless, disjointed, unrelated expressions which fail to reflect upon the appellant's claimed defense of diminished capacity.

Contrary to the inferences of the panel majority, that appellant was foreclosed from fully presenting his evidence of diminished capacity, the record discloses that he introduced the totality of that evidence which he was desirous of placing before the jury for its consideration.

Initially, his staged and scripted personal appearance before the jury where he read a carefully prepared, emotionally charged, opening statement insulated from any threat of personal impeachment through cross-examination[2] was dramatic. He described how he and his accomplice had partied the night before the Western Auto Store robbery, his hangover during the morning of the robbery, how he "shot gunned" three cans of beer and swallowed a single qualude tablet before leaving his sister's residence, the site of the party, to rob the Western Auto Store. He related how he and his accomplice stopped enroute and had a ham and cheese sandwich, purchased gasoline and ten qualudes of which each consumed two before they proceeded to "get the guns." He explained to the jury how he was "all messed up from the night before and what he had already consumed that morning" and how "I heard a crashing of glass and I'm not sure what caused my next movements, but I shot both men." He then told the jury that, "I ran to the front of the store and Mike had the guns and we left. I never intended to shoot anyone. It just happened. I ran around the next day and a half trying to sell the guns. I got arrested the next Sunday night and told them I did it and it is something that I have been living with for the past

[2]The defendant did not take the witness stand to testify in his own defense.

eighteen months and 26 days. I don't know how to put it in words how I feel."

A parade of defense witnesses followed who attested to the appellant's impeachment-free opening statement. The subject of his diminished capacity immediately before, at the instant of, and after the shooting, was thoroughly exhausted for the jury through appellant's opening statement and the direct and cross-examination of the witnesses who appeared on his behalf.

The state counterbalanced appellant's claim of diminished capacity by overwhelming proof, independent of appellant's signed confession, which reflected a well planned, efficiently implemented robbery and escape. Key to the state's evidence against the appellant was the positive identification of the appellant and the eyewitness detailed account of William Thompson, the manager of the Western Auto Store, who miraculously survived the intended instantaneous death from the bullet directed to his head by the appellant. He not only survived but remained conscious during the entire ordeal and had total recall of the entire incident.

Thompson testified that on two consecutive days next preceding the robbery, appellant and his accomplice Kruse visited the Western Auto Store and browsed for approximately 30 minutes on each occasion under suspicious circumstances. On each of the two visits Thompson was the only person attending the store. During these visits appellant and his accomplice noted the store room at the rear of the premises which was protected from the view of customers and sidewalk pedestrians and the location of the locked glass handgun display cabinet.

The state's evidence further developed that after leaving his sister's apartment on Saturday morning, January 6, 1980, appellant and his accomplice Kruse proceeded to a gas station where they bought gasoline and ten qualudes from the station attendant. They then proceeded directly to the Western Auto Store approximately five minutes

away. Before leaving their automobile, which was parked across the street from the store, appellant took a revolver from under the seat of the vehicle which he carried into the Western Auto Store. Thompson testified that he observed both men enter the store at approximately 9:30 a.m., when the appellant immediately directed him at gun point into the rear storage room where Allen was cleaning shelves and ordered both men at gun point to lay face down, head to head, in a 9 o'clock position while he stood over them. Thompson further testified he heard a customer enter the store and a conversation during which appellant's accomplice directed the customer to a hardware store to have his chainsaw sharpened. Thompson further testified that *after* he heard the customer depart he heard the sound of breaking glass, which he surmised was the glass of the gun display cabinet.

Thompson testified further that some moments *after* he heard the shattering of glass a shot exploded and he felt a searing and burning sensation in the back of the head, a pause before he heard a second shot which he knew was directed at Allen. The state further proved that the appellant had been awarded a marksman citation during his two years service with the Marines, that the two shots fired into his victims were fired from a distance of approximately eight to ten feet. It was apparent that firing a single shot from that distance, into an area as small as the base of a human skull, required sustained concentration, a steady arm, a steady hand, and a controlled trigger finger. Common knowledge dictates that a premeditated head shot is intended to cause instant death. It was also apparent from the evidence that the same concentration and physical control of placing the first shot had to be deliberately repeated a second time to accurately place the second shot into an area about the size of a billiard ball.

After firing both shots the appellant searched the rear room and found a cardboard box suitable for packing the handguns which he carried into the retail area of the store.

The evidence further disclosed that the two men thereupon carefully separated the guns from the shattered glass shards from the display case and placed the weapons into the cardboard container which the appellant casually walked across the street to Kruse's automobile. The appellant and his accomplice thereafter drove to a parking lot some distance away where they divided the handguns.

They then proceeded to the residence of appellant's friend, Gary Ramell (Ramell), arriving there at approximately 10:00 a.m. The appellant negotiated the sale of three guns to Ramell for the sum of $200.00. The pair then continued on to the home of another of appellant's friend, Richard Fehler (Fehler), arriving there at approximately 10:30 a.m. He negotiated the sale and sold additional guns to Fehler and picked up a cassette tape deck. Appellant and Kruse then returned to his sister's apartment, arriving at approximately 12:30 p.m. where they remained for approximately two hours during which time they attempted to install the cassette tape deck. Karen Bowman (Bowman), appellant's sister's roommate, testified that both men appeared normal during this period of time.

Kruse departed at about 2:30 p.m. and appellant borrowed Bowman's car and drove to the home of his cousin, Jim Hoffman, where he was to meet Larry Hensley (Hensley), who was interested in purchasing appellant's remaining handguns. Appellant negotiated the sale of his remaining guns for a price of $300 payable the next day. Appellant and Fehler, who had accompanied him to Hoffman's residence, returned to Fehler's home where they met Ramell at approximately 7:00 p.m. While appellant and Fehler were selling the remaining handguns to Hensley at the Hoffman residence, Ramell had viewed a television news account of the murder and robbery complete with photographs that resembled appellant and Kruse. Appellant hurriedly left the Fehler residence when Ramell attempted to question him about the source of the guns which he had purchased from the appellant. Ramell, Fehler, and Hensley notified the

police and agreed to cooperate in an investigation. As a result of their effort, appellant was apprehended at 10:10 p.m. on the night of Sunday, January 7, 1980. The appearance and action of the appellant immediately subsequent to the robbery and during the period when he was negotiating the sales of the handguns was described as normal. Certainly, his composed, calculated, and systematic efforts to negotiate the sale of the stolen handguns displayed no signs of panic, remorse, irrationality or other evidence of diminished capacity.

Albeit, the appellant's signed confession, as suggested by Judge Ryan, may have been "a simple, direct, calm and confident resitation of cold blooded murder .... devoid of any suggestion of hesitancy to act or confusion of purpose, or any hint of regret" and "an unqualified confession of premeditated murder." It was, nevertheless, the statement that the appellant wanted to sign. It was, in no detail, inconsistent with the overwhelming proof independently developed by the state and unanimously accepted by twelve of his peers who sat in judgment and sentenced him to death.

In sum, dispassionately reviewed, it was the state's overwhelming proof of the premeditated, deliberate, methodical, merciless, and cruel course of conduct which was pursued by the appellant from the selection of the robbery target, the "casing" of the premises, the systematic perpetration of the crime, including the execution and attempted execution of all identifying witnesses, to his post-execution activity in negotiating the sale of his stolen weapons, that reflected the objective manifestation of the appellant's complete physical and mental self-control: a self-control that was demonstrated immediately before and at the moment he deliberately fired the two shots into the skulls of two helpless men, while he executed his robbery with the precision of a planned military manuever, which included the intended execution of all identifying witnesses, and during an organized escape. Appellant's demonstrated deliberate course of conduct belies any irrational, confused reflex

actions that conveyed "the impression of clouded thinking and purpose" or a state of panic.

The jury, not the members of this reviewing court, had the opportunity of observing the behavior of the witnesses upon the witness stand; their manner of testifying; the reasonableness and probability of their testimony; the opportunity they had to see, hear, and know the things about which they testified; the accuracy of their memory; their candor or lack of candor; their intelligence, interest, and bias, together with all the circumstances surrounding their testimony, obviously assign greater credibility to the witnesses and testimony presented by the state. It assigned little, if any, credibility to the appellant, his witnesses, and their testimony. The panel majority *in absentia* now invades the jury's exclusive domain to judge the weight and credibility of the trial-developed evidence by rejecting its unanimously assigned credibility evaluations with a conjectured possibility anchored in factually unsupported suppositions and hypotheses, presumptions that do not rise to the level of a legal probability that, "it would be unreasonable to assume that *not one member of the jury, in sentencing petitioner, gave weight to the confession* when considering the death sentence." The speculation that a single juror might have been swayed by the confession in rejecting appellant's diminished capacity defense in the face of the state's overwhelming evidence is not only highly improbable, but impossible. To the contrary, it is reasonable beyond doubt that none did. I am convinced from the record beyond a reasonable doubt that the erroneous admission of appellant's confession was harmless in the sentencing phase of this case.

Accordingly, I join in Judge Kennedy's dissenting opinion, which affirms the disposition of the district court.

WELLFORD, Circuit Judge, dissenting.

I concur fully in Judge Kennedy's opinion with the reservation that I am not persuaded that Kordenbrock's trial counsel was trying to create an appealable issue by his somewhat inept handling of Dr. Nizny's potential as a witness for defendant. In any event, this has no bearing on the guilt stage of the proceedings in light of the overwhelming evidence that Kordenbrock intentionally killed one man and, but for fortuitous circumstance, would have killed another. Furthermore, *Ake v. Oklahoma*, 470 U.S. 68 (1985) requires only that an indigent defendant who specifically pleads insanity or its equivalent, is to be provided a competent psychiatrist "to assist in evaluation, preparation, and presentation of the defense," not one of defendant's (or his counsel's) choice. Defendant's constitutional rights under *Ake* were not violated under the circumstances of this case.

This view of *Ake* is fully supported by *Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990):

> Harris argues that he was denied access to a qualified psychiatrist who "conducts professionally competent examinations of the defendant and who on this basis provided professionally competent assistance." Appellant's Brief at 15. Harris contends that access to such psychiatric assistance is required by the due process protection holding in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985). We disagree.
>
> Under the narrow holding of *Ake*, the state must provide an indigent defendant with access to psychiatric assistance in only two circumstances: (1) at the guilt phase of a trial, when the defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt; and (2) at a capital sentencing proceeding, when the state presents psychiatric

evidence of the defendant's future dangerousness. [Fn 11] *Id.* at 83, 105 S. Ct. at 1096.

Another court has recently considered an indigent defendant's constitutional challenge, relying upon *Ake*, to the appointment by the court, in the case of an insanity plea to capital murder charges, of a psychiatrist "whose opinion and testimony is available to both sides." *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989). Such an expert was available to Kordenbrock in this case. In denying this challenge, the court stated:

> "A psychiatrist's examination is not an adversary proceeding. Its purpose is not to aid in the establishment of facts showing that an accused committed certain acts constituting a crime; rather its sole purpose is to enable an expert to form an opinion as to an accused's mental capacity to form criminal intent." *Stultz v. State*, 500 S.W.2d 853, 855 (Tex. Crim. App. 1973), *quoted in Granviel*, 552 S.W.2d at 115. Granviel's ability to uncover the truth concerning his sanity is not prejudiced by a court-appointed, neutral expert. Availability of a neutral expert provides defendants with "the raw materials integral to the building of an effective defense." *Ake*, 105 S. Ct. at 1093. The state is not required to permit defendants to shop around for a favorable expert.

Id. at 191, 192.

I am in agreement with the views of both *Harris v. Vasquez* and *Granviel v. Lynaugh* with respect to the proper interpretation of *Ake*. Judges Merritt and Martin rely upon authority such as *United States v. Sloan*, 726 F.2d 926 (10th Cir. 1985). That case involved a situation where the trial judge, faced with a defense of insanity and/or incompetence, appointed the same psychiatrist to examine the defendant who would be available to serve as a witness for the prosecution as well. The essential ruling of *Sloan* was that *Ake* is not satisfied by "appointment of

an expert who ultimately testifies contrary to the defense on the issue of competence." *Id.* at 929. The fact situation in *Sloan*, not a capital case, is completely distinguishable from the fact situation in the instant case. *United States v. Crews*, 781 F.2d 826 (10th Cir. 1986), also cited by Judge Martin in his expansive interpretation of *Ake*, involved as *the basic issue* in the case, also a non-capital case, the competence or sanity of the defendant who requested appointment of a psychiatrist. *Crews* is also inapplicable to the facts of this case; it interprets a federal statutory requirement (18 U.S.C. § 3006(e)(1)) and whether a defendant, specifically pleading incompetence or sanity, is entitled to appointment of a psychiatrist to assist him in this defense. *Ake* is a narrow holding applicable to specific unusual factual circumstances presented in that case.

GUY, Circuit Judge, concurring. I concur in Judge Kennedy's opinion and write additionally only on the *Miranda* issue. As Judge Kennedy points out, the government did not appeal the district court ruling that the confession was obtained in violation of *Miranda*. Had that issue been before us, however, I would have concluded contrary to the district court. Since I believe the confession was properly admitted, that obviously influences my judgment on the issue of the prejudicial effect, if any, of the confession in both the guilt and punishment phases of this trial.

DAVID A. NELSON, Circuit Judge, concurring, joined by Judge RYAN. Like Chief Judge Merritt, I am not satisfied beyond a reasonable doubt that suppression of the tainted portions of the appellant's confession would have made no difference in the vote of any member of the jury. My doubt extends to the jury's resolution of both the question whether the appellant was guilty of premeditation and the question whether he should be sentenced to death.

The untainted evidence against the appellant was very strong, as the dissents of Judges Kennedy and Krupansky persuasively demonstrate, and if this had not been a capital case, I would have been quite willing to invoke the harmless error rule.[1] Death cases can be different for jurors as well as for judges, however, and it seems to me that a jury that wanted to know whether the appellant could be sentenced to life imprisonment without possibility of parole (an option not available under Kentucky law) might very well have settled for life imprisonment with a possibility of parole had it not been for the emotional impact of the appellant's written statement.

That statement, as read to the jury during the Commonwealth's case-in-chief, strikes me as significantly more damaging, forensically, than an account of the unexceptionable portion of the preceding interrogation would have been. Early in the interrogation, for example, the appellant said, among other things, that "something snapped," that he "didn't know what was happening" when the customer came into the store, that he didn't

[1]One fact of potentially devastating significance -- that the appellant told his psychiatrist that he killed someone else the day before he killed Mr. Allen -- was never made known to the jury. If the jury had understood that there were two robbery-related homicides, committed a day apart, it would obviously be harder for us to conclude that the inadmissible portions of the confession could have affected any juror's vote. But it is undisputed that the prejudicial effect of the appellant's account of the single killing for which he was placed on trial must be analyzed in light of what the jury was told in the trial that actually occurred, and not what another jury might be told in a trial yet to come.

realize what was happening until "too late," and that he was "scared shitless." None of this was in the written statement, which simply said that the appellant aimed at the victims' heads and fired "so that they wouldn't get up." At a rational level, perhaps, the stark phraseology of this admission ought not to have made any difference. But at an emotional level -- and jurors do have emotions -- I think it could have tipped the scales. I therefore concur in the conclusions announced in Parts II and III of the majority opinion. I also concur in the disposition of the miscellaneous claims dealt with in Part V.

As to whether the appellant gave his written statement under compulsion, I have no quarrel with the suggestion in Part IV of the majority opinion that we need not decide the question. The appellant having invoked his right to cut off questioning before he gave the written statement, *Miranda* and its progeny, including *Michigan v. Mosely*, 423 U.S. 96 (1975), teach that the interrogation should have been stopped forthwith; that taking even a voluntary statement thereafter was improper; and that habeas corpus proceedings may be used to set aside a conviction and sentence obtained through use of a voluntary statement taken subsequent to a request that questioning be cut off. See *Martin v. Wainwright*, 770 F.2d 918, 922-24 (11th Cir. 1985), *modified*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986) (right to cut off questioning not "scrupulously honored" when questioning was continued after suspect said "Can't we wait until tomorrow;" voluntary confession obtained later that day held inadmissible.)

If the appellant's written confession was not "compelled" in a constitutional sense, however, I do not believe it is accurate to suggest, as the majority opinion does at several points, that there was a violation of *constitutional* norms. The Supreme Court has made it clear that *Miranda*'s exclusionary rule "sweeps more broadly than the Fifth Amendment itself." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). "The Fifth Amendment prohibits use by the prosecution in its case in

chief only of *compelled* testimony," *id.* at 306-07 (emphasis in original), while *Miranda* prohibits that and more. I have joined in the court's judgment in this case not because I think the Constitution says I must, but because I think the Supreme Court says I must.

To an observer from almost any foreign country -- including England and other jurisdictions that follow the same common law tradition we do -- the conclusion that the Kentucky trial court was required to exclude the appellant's written confession even if the confession was voluntary might well seem odd. Given the circumstances of the interrogation that led to the confession, there is a large part of the civilized world in which the wisdom of suppressing the confession probably would not be considered self-evident.

To begin with, before any questions at all were put to the appellant the police told him -- twice -- that he had a right to remain silent. They told him -- twice -- that he had a right to talk to a lawyer before any questions were asked, and that he had a right to have a lawyer with him during any questioning to which he might consent. They told him -- twice -- that if he could not afford a lawyer, one would be appointed for him, if he wished, before questioning began. And they told him -- twice -- that if he decided to answer questions without a lawyer present, he would still have the right to stop answering at any time.

The appellant said at the outset that he understood these rights. He stated both orally and in writing that he did not want a lawyer and was willing to make a statement and answer questions. In the questioning that followed, the appellant repeatedly demonstrated that he really did understand his right to remain silent; many of the questions were met with complete silence, the appellant saying nothing at all and simply waiting for another question to be put.

The appellant's exercise of his right to remain silent produced no untoward consequences at all. There was no exercise of physical force, no threat of physical force, no hint of physical force. The verbatim transcript of the interrogation does not suggest that the police ever lost their tempers, or even so much as raised their voices. If I had been a prosecutor in this case, I daresay I would have been quite content to have a videotape of the questioning shown in open court.

At no point did the police try to get the appellant to shade the truth in any way. After the appellant said that he was the one who pulled the trigger, for example, the questioner said "Don't jack us[;] if you didn't [do it,] tell us[;] if you did[,] tell us." There is no reason at all to doubt the sincerity of the appellant's response, which was "Sir, I did it, I told you." This is simply not a case where the police were trying to browbeat a suspect into confessing to a crime that he might not have committed.

The interrogation was not prolonged unreasonably; the verbatim transcript takes less than 40 typewritten pages, with a new line for the start of each question and each answer. There is no indication that the appellant was deprived of food or drink or bathroom privileges. When he wanted a cigarette, he was given a cigarette. When he asked for an exercise break, he was given an exercise break. This is a long way indeed from the rubber hose or the rack and thumbscrew.

It is true that in what proved to be a successful attempt to persuade the appellant to continue talking after he had indicated that he preferred to stop, the questioners played on the appellant's concern that the three "girls" with whom he had spent the preceding night not be taken into custody or otherwise "hassled" by the Cincinnati police. This kind of psychological pressure does not necessarily render a confession involuntary, see *Martin v. Wainwright*, 770 F.2d at 926-27, and I suspect that prior to *Miranda*, few American judges would have considered the use of such a ploy impermissible. The appellant

having asked that the questioning be ended, *Miranda* makes it clear that the police did go too far; it is not at all clear that they went too far under the Constitution itself.

Be that as it may, we are obviously bound to follow the decisions of the Supreme Court unless the Court (or Congress, where Congress has power to act) instructs us otherwise. There were strong reasons for the Supreme Court's decision to adopt the prophylactic rules that were put into place with *Miranda*, and perhaps even the outer limits of those rules -- which is all we are dealing with here -- are immutable. If the Supreme Court is concerned about the practical effect of the more far-reaching of the non-constitutional parts of the *Miranda* rules, however, this case might be an appropriate one for further scrutiny.

With respect to Part III of Judge Kennedy's opinion and Part VI of Judge Merritt's opinion, both of which deal with the constitutionality of the Commonwealth's refusal to provide the psychiatric expert the appellant says he wanted, it is my understanding that the funding problem that existed at the time of trial has now been resolved. Because it appears that a psychiatric expert will be provided on retrial, I do not think it is necessary for us to decide the issue -- and the present record contains some factual idiosyncrasies which suggest to me that it would be prudent for us to steer clear of it.

As to the proposed jury instruction regarding unanimity on mitigating circumstances, I concur in Part IV of Judge Kennedy's opinion.

RYAN, Circuit Judge, concurring. Because I am unable to say, beyond a reasonable doubt, that the unlawfully admitted confession did not contribute to the verdict and subsequent death sentence in this case, I cannot vote to affirm.

My reasons are those so well stated by Judge Nelson in his concurring opinion. I add, however, this additional thought:

One need only read the illegally admitted written confession, and then the defendant's opening statement, to appreciate the stark contrast between the two. The written statement reads as a simple, direct, calm, and confident recitation of cold-blooded murder. It is entirely devoid of any reference to alcohol or drug use, any suggestion of hesitancy to act or confusion of purpose, or any hint of regret. The defendant's opening statement at trial, on the other hand, is a detailed narrative of heavy and continuing drug and alcohol consumption immediately preceding the killing, an abbreviated description of the robbery and shooting in language conveying the impression of clouded thinking and uncertain purpose, and then an explicit denial of an intent "to shoot anybody."

While the two statements are consistent in that, in both, the defendant acknowledges the robbery and killing, they are dramatically inconsistent in the important details concerning the clarity of the defendant's thinking, his use of alcohol and drugs, and his criminal purpose; in a word, his state of mind, the vitally important single element that determines, in the last analysis, whether the defendant shall be put to death.

The illegally admitted confession is not only an explicit and damning admission of the killing, it is, by its language, tone and content, as well as the absence of any claim of diminished capacity or uncertainty of purpose, powerful circumstantial proof of a clearheaded intention to execute both victims. It is a complete and unqualified confession of premeditated murder, strikingly inconsistent

with the defendant's courtroom claim of diminished capacity. As such, it is the most powerful, although not the sole, evidence in the record of the defendant's malice and premeditation. I cannot say, beyond a reasonable doubt, that such evidence did not "contribute to the verdict." *Chapman v. California*, 386 U.S. 18, 23 (1967).

I concur in Judge Nelson's opinion in all other respects as well.

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 88-5467/89-5107

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL KORDENBROCK,
Petitioner-Appellant,

v.

GENE SCROGGY, WARDEN,
KENTUCKY STATE PENITENTIARY,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed November 3, 1989

Before: KENNEDY, KRUPANSKY and WELLFORD, Circuit Judges.

KENNEDY, Circuit Judge, delivered the opinion of the court in which KRUPANSKY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 31-35) delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Appellant Paul Kordenbrock appeals the District Court's denial of his petition for a writ of habeas corpus. Appellant claims that his conviction for intentional murder, for which he received the death penalty, and attempted murder were obtained in violation of his federal constitutional rights.[1] He raises nine issues on appeal.

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[1]Appellant was charged with murder, attempted murder, and first degree robbery. He pled guilty to the robbery charge, for which he was

We agree with the District Court that the introduction of his confession—taken in violation of his *Miranda* rights—was harmless error, and that the other alleged errors did not violate his constitutional rights.[2]

On Friday, January 4, 1980 at 9:30 a.m., appellant Paul Kordenbrock and a codefendant, Michael Kruse, parked across the street from a Florence, Kentucky, Western Auto store. They had planned to steal guns from the store and sell them for drug money. Appellant and Kruse entered the store together. Appellant carried a gun. The owner of Western Auto, William Thompson, was in the front of the store while his employee, Stanley Allen, was in the back. Appellant ordered the men at gunpoint to move to the rear of the store and lay face down. He stood over them with the gun. About that time, Jack Webster and his eight-year-old son came into the store to have his chainsaw repaired. Kruse, posing as a sales clerk, told him they did not do repair work. Webster and his son left, at which point Kruse broke the glass of the gun display case. At that time, appellant shot Allen in the back of the head and Thompson in the neck from a distance of seven to eight feet. Allen died, but Thompson survived. Appellant and Kruse carried the guns to their car and drove off. After they left, Thompson called the police, an ambulance, his wife, and Allen's wife.

The day before the robbery appellant and Kruse were at the Western Auto store from 1:00 to 1:30 p.m. examining wood cutting tools. Thompson was alone at the store and Allen was at lunch. The next day, appellant and Kruse again

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sentenced to 20 years imprisonment. Appellant was also sentenced to 20 years imprisonment for the attempted murder conviction.

[2]In his petition for habeas relief, appellant raised twenty-three assertions of error. The District Court, after conducting extensive evidentiary hearings, issued a comprehensive published opinion denying relief. *Kordenbrock v. Scroggy*, 680 F. Supp. 867 (E.D. Ky. 1988).

went to the store at 1:00 p.m., and appellant purchased a hatchet. Appellant also saw several guns in a glass display case and asked to look at a Colt Python pistol. Thompson showed him the gun and appellant and Kruse left the store without incident.

That evening, the two men went to a party at appellant's sister's Cincinnati apartment. Appellant drank beer and whiskey, smoked marijuana, and took some cocaine. He and Kruse spent the night at the apartment, and the next morning appellant drank two beers and took two Quaaludes. They left at 9:00 a.m. to buy a tape deck from a friend of appellant. On the way, they stopped at a gas station where they purchased ten Quaaludes from a Jeffrey Piper. According to Piper, the pair appeared "laid back" on Quaaludes. Appellant and Kruse then went to the Western Auto store and committed the crimes involved in this appeal.

Less than an hour after the robbery, appellant and Kruse went to a Gary Ramell's home where they sold him three of the stolen guns for $200. They then went to the home of Richard Fehler where at 10:30 a.m. they sold two guns, payment for which was due January 15, 1980. According to Fehler, appellant appeared jittery and took some more Quaaludes. That afternoon, appellant met a Larry Hensley who purchased six guns for $300, payable the next day. In the meantime, Ramell saw a newscast about the robbery and murder which included composite drawings resembling appellant and Kruse. Hensley also saw the news and noticed that the guns he bought from appellant came in a Western Auto box containing broken glass. Ramell, Fehler, and Hensley decided to cooperate with the police. Hensley arranged to meet appellant at 10:00 p.m., the day following the robbery, to pay for the guns he received from appellant. Hensley loaned the police his truck, and appellant was arrested at 10:10 p.m. that night. He was taken to the police station for interrogation at about 11:30 p.m. and made a full confession approximately two and one-half to three hours later.

A Kentucky jury convicted appellant of murder and attempted murder. The primary evidence against appellant relating directly to the murder was the testimony of Mr. Thompson and Kordenbrock's confession. The court, upon recommendation of the jury, sentenced appellant to death. Following unsuccessful appeals in Kentucky state courts, he petitioned the District Court for the Eastern District of Kentucky for habeas relief, which was denied. We consider his nine claims of constitutional violations seriatim.

First, appellant claims that since he is indigent, the Constitution entitles him to a state-funded psychiatrist to assist him in the guilt and sentencing phase of his trial. Although appellant did not assert insanity as a defense,[3] he hoped to use psychiatric testimony to establish a defense of diminished responsibility based on his habitual drug and alcohol abuse. He also hoped to use the same testimony for purposes of mitigation in the sentencing phase. For the reasons set out below, we agree with the District Court that appellant was not deprived of any constitutional right.

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[3]"Counsel for defendant Kordenbrock have never served notice of an intention to rely upon insanity as a defense. The Court believes that Kordenbrock has been afforded ample opportunity to develop such a defense if one exists." Order Denying Continuance, June 2, 1981, Judge Sam Neace, Boone County Circuit Court. Joint App. at 61. Appellant's counsel testified for the District Court evidentiary hearing on the writ that appellant's sanity was never considered as a defense:

> Q: I understand that your belief was at all times that your client was not insane, nor was he incompetent to stand trial. Is that correct?
>
> A: That's my— that was my belief, and that is my belief.
>
> . . .
>
> Q: . . . [N]ever at any time did you ever pursuant to the statutory requirements of Kentucky file a notice of your intention to claim an insanity defense, did you?
>
> A: I— that's correct. I had no factual basis to do that.

Appellant obtained the services of a Dr. Melvin Nizny, a Cincinnati, Ohio, psychiatrist. Dr. Nizny examined appellant and gave his attorneys an oral report of his evaluation. Although Dr. Nizny ordinarily did not require payment until after he had testified and even though Dr. Nizny had not submitted a bill, counsel for appellant advised Dr. Nizny that Boone County would refuse to pay his bill. Counsel knew that there was an ongoing dispute over whether the county or the state was responsible for paying experts appointed to assist criminal defendants. Counsel advised the Circuit Court that Dr. Nizny would not give a written report or testify unless he was guaranteed payment. The Circuit Court issued an order directing the Boone County Fiscal Court to pay Dr. Nizny. The Fiscal Court refused to do so. Appellant's counsel made no effort to enforce the order. The District Court found that counsel could have urged the Circuit Court to hold county officials in contempt or to levy on county bank accounts or to subpoena Dr. Nizny to testify.

Dr. Nizny was never advised of the Boone County Court's order directing he be paid one half upon the filing of his report and the other half after he testified. The District Court found that counsel's failure to secure payment and to have Dr. Nizny testify was a deliberate attempt to create an appealable issue. The court concluded that Dr. Nizny's evaluation would not have been useful to appellant's defense, and that his counsel was aware of it. Dr. Nizny's oral report to counsel did not indicate any mental illness. Further, appellant had told Dr. Nizny that on the night before the robbery of the Western Auto store he had robbed a gas station and killed the attendant. The unfavorable nature of Dr. Nizny's report, plus counsel's failure to take any of the obvious steps to obtain Dr. Nizny's assistance, caused the lower court to conclude that appellant was not "denied" psychiatric assistance; he was merely maneuvering to create an appealable issue. *Kordenbrock v. Scroggy*, 680 F. Supp. 867 (E.D. Ky. 1988). This is a factual finding made after an extensive evidentiary

hearing which can be set aside only if clearly erroneous. *See Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 616 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Upon examination of the record, we are not persuaded that a mistake has been made. *Id.* ("A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.") Although we do not condone the state's refusal to pay Dr. Nizny, we find no constitutional violation.

Counsel's further efforts to secure another psychiatrist failed. The case was again continued (it had previously been continued when Dr. Nizny was unavailable) and the trial court ordered appellant to be examined by a psychiatrist at a state institution who could assist in appellant's defense.

Pursuant to that order, appellant was seen on November 21, 1980, by a Dr. James Bland of Forensic Psychiatry Services, a public hospital operated by the Kentucky Department of Human Resources. Dr. Bland was to examine appellant on the issue of his competency and sanity. Because the state restricted such experts to a neutral and objective evaluation concerning only competence to stand trial and sanity, and because he feared that Dr. Bland's opinion might not remain confidential, appellant's counsel advised him not to cooperate.

On May 15, 1981, appellant requested and was granted the appointment of a Dr. Michael Gureasko to act as a defense psychiatrist. However, on May 18, Dr. Gureasko called the court and told it he would not assist appellant because of a misunderstanding with counsel. The court denied appellant's motion for a further continuance and the case was tried.

Appellant relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985) for his claim that the Constitution guarantees him a court-appointed psychiatric expert to assist in his defense and in the penalty phase of trial. *Ake* held that:

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. The Court qualified this right:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed ....

Id. Appellant claims his constitutional rights were violated because the county refused to pay for Dr. Nizny's services and because the state-funded expert offered, Dr. Bland, was limited to determining appellant's competence and sanity, and could not make an evaluation concerning his diminished responsibility or other mitigating factors.

However, appellant's claim that the scope of Dr. Bland's examination and testimony was too limited to be effective is without merit. Dr. Bland testified at the evidentiary hearing in the District Court that he could have addressed all of the psychiatric issues appellant's counsel wanted Dr. Nizny to address.[4] Moreover, appellant'e objection that Dr. Bland was

(*Text continued on page 9*)

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[4]Dr. Bland was a physician specializing in psychiatry. He testified that he would have been able to examine all areas of appellant that Dr. Nizny was requested to examine:

> Q: Are any of the [nineteen] questions posed in the letter from Mr. Monahan to Dr. Nizny ... in that September the 8th, 1980, correspondence that you would have been prohibited, unable, or unwilling to address, had you been able to examine and had Mr. Kordenbrock cooperated with you?

A: I can't say that I would be able to answer all of them in any substantial way. That would depend on a lot of factors. But I didn't see any here that I wouldn't be able to address. And in fact they're the types of questions that are commonly asked in trial proceedings regarding my testimony.

Q: All right. Those questions are commonly posed questions in cases where mental capacity or mental illness might be an issue?

A: Yes.

. . .

THE COURT: Turn particularly to number 11, what statutory and otherwise mitigating factors exist in Paul's commission of these offenses? Would you have been able to consider that and testify on that if you had come up with some— if they had come up with something favorable to the defendant?

THE WITNESS: Yes.

. . .

THE COURT: What about number 15, can Paul be rehabilitated? Could you have given the jury in the sentencing phase an opinion on that?

THE WITNESS: That was not an unusual question to be asked, your honor. Yes, I could have.

Dr. Bland was also prepared to investigate and testify as to appellant's family history and psychological background:

Q: As part of your mental— your examination of the accused, Doctor, during this period is a thorough history taking important?

A: Yes.

Q: Would you include in that history as part of your opinions effects of any drugs or alcohol which the defendant might use either chronically, or on the occasion of the crime or on the occasion of a subsequent confession to the crime?

A: Yes. That would be part of the history.

. . .

Q: And would you have been prepared to testify, Doctor, if called by the defense if you found there to be any effects of

neutral and therefore could not give effective defense assistance is without merit. *Ake* merely requires that a *competent* psychiatrist be provided to assist indigent defendants, not the psychiatrist of their choice. 470 U.S. at 83. Appellant's argument that Dr. Bland was not required to examine him at his counsel's direction is belied by Dr. Bland's stated willingness to pursue the examination along a course plotted by defense counsel:

> Q: . . . Would you have— would you have if directed by the court engage in any other matter which the — defendant's attorneys might ask you to pursue, if ordered by the court?
>
> A: Yes.
>
> Q: Regardless of the amount of time which it might take?
>
> . . .
>
> A: Yes, I would.

Dr. Bland also stated that his neutral, objective evaluation would have supplied defendant with any information that appellant could use in his defense:

> THE COURT: But you would have made the evaluation and called it either way you saw it. You would have made the evaluation. If you thought he was crazy with drugs and irresponsible from the drugs, or couldn't form the criminal intent from the drugs, or form a mitigating circumstance, or anything in

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any of those things with respect to any of your opinions as to the capacity of an individual?

A: Yes.

Q: Likewise, family background, intelligence and other environmental factors?

A: Yes, that would be considered.

> his family background were a mitigating circumstance you would have just reported like you saw it, right?
>
> THE WITNESS: I would have just reported it as I saw it and also gave an interpretive opinion about how that might have or might not have in my opinion affected the situation.

We agree with the District Court that Dr. Bland's assistance, had appellant taken advantage of it, would have met *Ake*'s command of guaranteeing appellant "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. We also agree that as a matter of strategy appellant chose not to avail himself of this witness. His concern over confidentiality could have been met by a court order. The trial court evidenced a cooperative attitude to provide appellant with the service of a psychiatrist.

Appellant's constitutional rights under *Ake* were not violated. *Ake*'s guarantee of a state-funded psychiatrist arises only after defendant shows that his sanity will be "a significant factor at trial." *Id. See also Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986); *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir. 1985); *Bowden v. Kemp*, 767 F.2d 761 (11th Cir. 1985). Appellant never attempted to raise insanity as a defense. At most he sought to show that his capacity was diminished through drug and alcohol use, thus depriving him of the specific intent necessary to convict him of intentional murder. Although *Ake* does not "establish a bright line test for determining when a defendant has demonstrated that sanity at the time of the offense will be a significant factor," it is clear that "*Ake* requires that the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case." *Cartwright*, 802 F.2d at 1212 (quoting *Volson*, 794 F.2d at 176). Such a showing is not made by merely positing that appellant was

a habitual drug and alcohol abuser. *See Pedrero v. Wainwright*, 590 F.2d 1383, 1391 (5th Cir.), *cert. denied*, 444 U.S. 943 (1979) (pre-*Ake* case holding that insanity is not made an issue by showing defendant was a drug addict entitling him to state-funded defense psychiatrist).

Finally, even if the state court did improperly deny appellant access to Dr. Nizny, we agree with the District Court that his constitutional rights under *Ake* were adequately protected by the testimony of Dr. Eljorn Don Nelson. Dr. Nelson taught pharmacology at the University of Cincinnati College of Medicine and directed the college's drug and poison information center. He teaches medical students, physicians and psychiatrists about the diagnosis and treatment of drug and alcohol abuse. He had received special training in the area of psychopharmacology. It is again important to note that appellant admittedly never made his *sanity* an issue—he only sought to establish diminished capacity and the inability to form specific intent because of drugs and alcohol. At trial, Dr. Nelson testified that he had examined appellant and detailed his long history of drug and alcohol abuse. He then testified specifically about appellant's mental state at the time of the crime:

> Q: Doctor, do you have an opinion as to Paul Kordenbrock's ability to fully control his actions at 9:30, Saturday, January 5th, 1980, based on . . . information about his level of drugs?
>
> A: I think that Paul Kordenbrock was under the influence of alcohol and/or Diazapam and/or Phencyclidene and I think he, probably, as a result of that had a diminished ability to exercise judgment, ethical decisions, and formulate complex thoughts. I think he was basically, in lay terms, he was drunk and stoned. That is my opinion.
>
> Q: . . . [D]o you have an opinion as to whether or not Paul Kordenbrock was psychologically and

> physically addicted to drugs at 9:30 on Saturday, January 5th, 1980?
>
> A: I think he was physically and psychologically addicted to alcohol. If the street tablets contained Diazapam he was certainly psychologically and physically dependent to that.

Dr. Nelson's testimony went to the heart of appellant's defense. On appeal, appellant fails to establish how Dr. Nizny's testimony would differ or add to Dr. Nelson's testimony. Although he claims that Dr. Nizny's testimony would have explained to the jury why appellant behaved the way he did, it appears that Dr. Nelson's examination and testimony were sufficient to establish the defense of diminished responsibility and mental capacity. Simply asserting that Dr. Nizny's testimony would have been beneficial is not enough. "Where a defendant offers 'little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision [to deny psychiatric assistance].' " *Bowden*, 767 F.2d at 765 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)). Appellant's defense was not that he was insane or mentally diseased—it was only that drugs and alcohol affected his ability to formulate specific intent and should have been used for mitigation in his sentence. Therefore, we agree with the District Court that any error in denying access to Dr. Nizny was harmless to the extent that Dr. Nelson examined appellant and testified to the same issues. Appellant's constitutional rights under *Ake* were not violated.

Lastly, *Ake*'s guarantee of access to psychiatric counsel in the sentencing phase of trial does not apply to these facts. *Ake*'s guarantee applies in two situations— when the defendant's sanity is a significant factor at trial and "in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness." 470 U.S. at 83. *Ake* only guarantees a defen-

dant the right to a psychiatrist at the sentencing phase to oppose the government's psychiatric testimony. The Supreme Court explained that the need for a defense psychiatrist arises only when the government uses an expert because "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's *opposing* view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the *State's proof of an aggravating factor.*" *Id.* at 84 (emphasis added). In *Bowden*, the court stated that "[u]nlike the sentencing situation in *Ake*, Bowden's prosecutor had no need to present psychiatric evidence to show an aggravating factor, and he presented none. The dangers and inequities which concerned the Court in *Ake* consequently do not exist." 767 F.2d at 764 n.5. Nor do those dangers and inequities exist in this appeal. The state presented no psychiatric experts at the sentencing phase, only a doctor who was a general family practitioner who testified about the effects of drugs. As such, appellant was not constitutionally entitled to a state-funded psychiatrist under *Ake*. In addition, the testimony given by Dr. Nelson went to the effects of his drug and alcohol abuse and could be used for purposes of mitigation and to counter the state's witness.

Appellant next claims that his confession was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), that it was not voluntary, and that its admission prejudiced the jury in the sentencing phase. The District Court found that although appellant's confession was obtained in violation of *Miranda*, its admission was harmless error and that appellant waived any violation by using the confession affirmatively in his opening statement and as a mitigating factor in the sentencing phase of trial as part of his defense strategy. Appellant asserts, however, that its admission was still not harmless error with regard to sentencing because its cold calculated tone may have impacted on the jury's determination of his sentence in violation of his eighth amendment right to a reliable determination of guilt and sentence. We agree with the District Court that no constitutional violation occurred.

Both the state courts and the District Court found that appellant's will was not overborne and that his confession was the product of free will and rational choice. *See United States v. Murphy*, 763 F.2d 202 (6th Cir. 1985). Voluntariness of a confession is a mixed question of law and fact and a reviewing court "will not disturb the trial court's findings . . . unless clear error appears on the record." *Id.* at 205-06. Voluntariness is determined by the totality of the circumstances surrounding the confession, taking into consideration the accused's age, intelligence, physical and emotional state, and the inherent coerciveness of the interrogation setting. *Id.* at 205.

Review of the record shows that although the interrogators at times threatened that several of appellant's friends would be arrested if he did not continue to give a fuller statement, the record as a whole indicates that the trial court's finding of voluntariness was not "clear error." Appellant was cogent, there was no force or threat of force by police, and he was not emotionally distressed. *Cf. United States v. Brown*, 557 F.2d 541 (6th Cir. 1977).

The District Court found that introduction of appellant's written confession was, however, in violation of his *Miranda* rights because his request to stop the questioning until the next day was not honored. Under *Miranda*, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74. The Supreme Court has said that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). After admitting that "I did it. . . . That's all I can tell you is that I did it" and "Sir, I did it I told you," appellant attempted several times to postpone further interrogation to the next day. Urged by the further interrogation of the police, he went on to detail the robbery and murder, saying at one

point that "I tried to shoot them so they would not get up." After holding that the continued questioning violated *Miranda*, which Kentucky has not appealed, the District Court went on to find its admission harmless.

After careful review of the entire record, we agree that admission of the confession was harmless. Before he asked to stop the interrogation, appellant had admitted committing the murder. This admission was made after he waived his *Miranda* rights. The basic admission of guilt was thus not obtained in violation of *Miranda*. In analyzing the impact of the entire written confession on the trial, appellant has asked that we distinguish its effects on the guilt phase from its effects on the sentencing phase. Appellant argues that "[e]ven if it could be possibly argued that the error complained of herein was harmless as to the conviction, it cannot be argued that it was harmless as to the sentence of death." Appellant's Brief at 58. As the District Court found, appellant used his confession as part of his defense strategy. He did not deny committing the murder and attempted murder, but rather sought to explain the circumstances and avoid the death penalty. In the guilt phase, appellant's strategy was to confess to the jury early on. At the beginning of the trial he personally addressed the jury, openly admitting his guilt but indicating that he was under the influence of drugs and intoxicated at the time of the crime. He argues that this strategy was hampered by the callous tone of his written confession, which did not mention intoxication or drug use and which included the statement that he shot the victims "so they wouldn't get up."

Appellant argues that his personal statement to the jury admitting the murder and attempted murder was not a matter of choice, but was rather a strategy he was forced into because the trial court erroneously refused to suppress his written confession, taken in violation of his constitutional rights. However, we agree with the District Court that it is clear that appellant would have adopted this trial strategy even if his

confession had been excluded in view of the overwhelming independent evidence of his guilt. In *Burks v. Perini*, No. 85-3507 (6th Cir., Nov. 25, 1986) (unpublished opinion) this Court held that admission of an invalidly obtained confession was harmless error and rejected the defendant's claim that he confessed to the jury as part of his defense strategy only because the trial court erroneously admitted his illegal confession. Under circumstances impossible to distinguish from those of this appeal, the defendant, Burks, shot two men, one of whom died and the other of whom (Hernandez) survived. This Court reasoned:

> Hernandez, who was the only eye witness to the shootings, testified that Burks had shot both men without provocation. In light of this substantial independent evidence that Burks had indeed shot both of the victims and that the shootings were unprovoked, a self defense theory was the only recourse available to Burks to justify the shootings. Since Hernandez and Burks were the only witnesses to the actual shootings, Burks was confronted with the dilemma of permitting the jury to consider his guilt or innocence on the sole condemning testimony of Hernandez or, in the alternative, testifying on his own behalf and asserting that he shot the two men in self defense. He elected the latter course of action, but failed to convince the jury of his claimed defense. Accordingly, this court concludes that the government's use of Burks' involuntary statement did not induce him to testify on his own behalf and that the trial court's decision to admit his confession, although erroneous under the circumstances, constituted harmless error.

Id., slip op. at 3. Similarly, overwhelming evidence existed to convict appellant. There was the testimony of Mr. Thompson, who positively identified appellant as the murderer. Appellant had been in the store twice in the days immediately

before the robbery. There was appellant's possession and sale of the guns almost immediately following the robbery and there were his oral admissions of the killings before he asked to stop the interrogation. No rational juror could have failed to find him guilty of killing Allen and attempting to kill Thompson.

Appellant's sole possible defense was to admit to the killing and claim diminished capacity. Appellant was "confronted with the dilemma of permitting the jury to consider his guilt or innocence on the sole condemning testimony of [Thompson] or, in the alternative, testifying on his own behalf and asserting that he shot the two men" while in a diminished capacity. Appellant, like Burks, confessed to the jury because it was the only possible way to avoid the death penalty. We adopt *Burks'* analysis and find that here, as in *Burks*, the state's use of his illegally obtained confession did not induce appellant to make the statement he did to the jury. The erroneous admission of the confession was on the entire record harmless.

Appellant's reliance on *Harrison v. United States*, 392 U.S. 219 (1968) is inapposite. There, the Court held that the defendant's confession at trial, which was used to avoid the effects of three illegally obtained confessions, was improperly obtained "fruit of the poison tree" because it was induced by the prior confessions. The defendant's in-court confession was used to give a version of facts *different* from his prior confessions. Here, however, appellant *adopted* his prior confession and used it to support his defense. We agree with the District Court that this was a defense strategy to avoid conviction and imposition of the death penalty, and it was a strategy appellant would have followed even if his original confession had been excluded. Because *Harrison* applies only where admission of an illegally obtained confession *induces* a defendant to testify, *Oregon v. Elstad*, 470 U.S. 298 (1985),[5]

[5]The District Court also held that *Elstad* implicitly overruled *Harrison*, citing *United States v. Perri*, No. 83 C 1439 (N.D. Ill. Sept.

it is inapplicable here. As the District Court found, appellant's admission in court was the only basis of ameliorating what otherwise appeared to be a cold-blooded execution and a botched attempt at a second one.

Appellant asserts that even if the confession was harmless in the guilt phase due to the presence of overwhelming independent evidence of guilt, it may have caused at least one juror to impose death[6] because it contained his statement that he tried to shoot Allen and Thompson "so they wouldn't get up." In his statement in court, appellant explained the circumstances surrounding the crime, including his intoxication and use of Quaaludes. He also explained that he "never intended to shoot anybody," that he had been "living with [the shooting] for the past eighteen months and twenty-six days," and that he didn't "know how to put into words how I feel." Appellant's opening statement. Appellant directs us to *State v. Lee,* 524 So.2d 1176 (La. 1987); *Cannaday v. State,* 455 So.2d 713 (Miss. 1984), *cert. denied,* 469 U.S. 1221 (1985). These cases relied on the fact that the defendants' confessions showed they had no remorse for their crimes and therefore could have influenced the jury to recommend death. However, in appellant's case we have his statement made to the jury for the express purpose of showing remorse. Read in its entirety, the earlier confession does not significantly differ from appellant's in-court admission. He also claims the confession was prejudicial because it failed to mention his drug and alcohol use. However, there was overwhelming and uncontradicted evidence presented to the jury tracing appellant's drug and alcohol use. We find that its effect in the sentencing phase was harmless beyond a reasonable doubt.

16, 1985). Because reaching that issue is not essential to our disposition of this case, we take no position on the correctness of this holding.

[6]Kentucky allows the imposition of death only if the jury unanimously recommends it.

Appellant next claims his sixth, eighth, and fourteenth amendment rights under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) were violated by the state's use of the word "recommend" in reference to the jury's role in imposing capital punishment. KRS 532.025(1)(b) provides that upon a finding of guilt in a capital case tried before a jury:

> the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances ... exist and to recommend a sentence for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

During voir dire the Commonwealth attorney stated to members of the jury that on the intentional murder count they would be required to recommend the sentence to the judge who "imposes that sentence." It was explained that the judge "heavily" considered the recommendation or that he would give the recommendation "great weight." The penalty phase jury instructions also told the jurors that on the death count they should recommend one of the three possible sentences, 20 or more years, life imprisonment, or death. Appellant claims that because the state characterized the jury's role in imposing capital punishment as one of "recommending" death, the jury perceived that its decision was not final and therefore felt less responsible in imposing the death sentence. Under *Caldwell*, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. The question then is whether the state's use of the word "recommend" impermissibly lessened the jury's sense of responsibility in imposing death and caused them not to appreciate their responsibility. We find that the jury was not misled and therefore affirm the District Court.

The state's use of the word "recommend" did not violate appellant's constitutional rights under *Caldwell*. *Caldwell*, as well as post-*Caldwell* cases appellant relies upon, are distinguishable. Each case involved deliberate attempts by the state to convince the jury that responsibility for imposing death rested elsewhere. In *Caldwell*, the prosecutor told the jury its decision regarding punishment is not final, and that their "job [in imposing death] is reviewable," the decision you "render is automatically reviewable by the Supreme Court" and that "your decision is not the final decision." *Id.* In *Sawyer v. Butler*, 848 F.2d 582, 597 (5th Cir. 1988), the prosecutor told the jury that "if you are wrong in your decision, believe me, there will be others who will be behind you to either agree with you or to say you are wrong." In *Adams v. Wainwright*, 804 F.2d 1526, 1528 (11th Cir. 1986), the court told the jury that the "Court is not bound by your recommendation [of death]. The ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in [the sentencing phase]." In *Ward v. Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985), the prosecutor told the jury that if they "were to decide to recommend, and it is only, I want to point this out again to you, a recommendation. If we do [get the recommendation] it [the death penalty] may very well not [happen]." In *Frye v. Commonwealth*, 345 S.E.2d 267, 284 (Va. 1986), the prosecutor told the jury that the "judge will be the person that fixes sentence if you find the defendant guilty . . . and fix punishment at death. The Court will pronounce sentence."

In contrast to these cases, the prosecutor in the present appeal neither explicitly nor implicitly tried to persuade the jury that its recommendation of death would not be final. He was careful to point out that the court would give the jury's recommendation "great weight" or "heavily" consider it. Nowhere in the record does appellant point to any statement indicating to the jury that it would not be responsible

for the sentence of death. There were no representations to the jury that their sentence would be reviewed or that the final decision of death would rest elsewhere. This is clearly distinguishable from the cases cited by appellant. The Court in *Caldwell* was also concerned that the argument was inaccurate and misleading as to the nature of the appellate court's review. The appellate courts in Mississippi do not impose the death penalty, but rather merely review the jury's decision and that review is done with a presumption of correctness. There is no appellate mercy. 472 U.S. at 331.

Here, neither the Commonwealth attorney nor the trial court misstated the law. The jury's function is to make a recommendation which is given great weight by the judge. There was no effort to diminish the jury's responsibility.

In addressing this same constitutional issue, the Eleventh Circuit has ruled that no constitutional violation occurs by merely referring to the jury's "recommendation":

> We believe the Supreme Court intended that a *Caldwell* violation should include some affirmative misstatement or misconduct that misleads the jury as to its role in the sentencing process. *Caldwell* does not mandate reversal if an *advisory* jury is told that its role is to advise or to recommend. . . .[E]mphasizing . . .the fact that the jury is making a "recommendation" to the judge, does not support a *Caldwell* claim. Such statements are neither inaccurate nor misleading.

Harich v. Dugger, 844 F.2d 1464, 1473-74 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1355 (1989) (emphasis in original).[7]

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[7]In *Harich*, the jury was told that its sentence was an advisory recommendation and that the court would impose the final sentence. On appeal in a habeas proceeding, the Eleventh Circuit said "[n]either the prosecutor nor the trial judge implied that the jury's recommendation was superfluous. The fact that the jury knew they were making a recommendation did not detract from the importance of their decision." 844 F.2d at 1475.

In the present appeal, the prosecution made no statement to the jury beyond the fact that it was to recommend a sentence. Even then it reiterated that the court would give their recommendation "great weight." We conclude that in this context mere use of the word "recommend" did not violate appellant's constitutional rights under *Caldwell*.

While not dispositive of the constitutional issue, we find further support for this result in Kentucky cases holding that use of the word "recommend" by itself is not reversible error. *See Sanborn v. Commonwealth*, 754 S.W.2d 534, 546 (Ky. 1988); *Matthew v. Commonwealth*, 709 S.W.2d 414, 421 (Ky. 1985), *cert. denied*, 479 U.S. 871 (1986) ("[U]se of the word 'recommend' . . .is not incorrect as long as the context in which it is used does not mislead the jury as to its . . .responsibility in exercising its sentencing function."); *Skaggs v. Commonwealth*, 694 S.W.2d 672, 679 (Ky. 1985), *cert. denied*, 476 U.S. 1130 (1986) (" '[R]ecommendation' is used in the statute and it is clearly proper to refer to it as such. The error occurs when, because of additional comments, a message is conveyed that the juror's decision is not the final one.").[8]

Appellant also argues that the Kentucky Supreme Court's new procedural requirement announced in *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988) that juries be instructed to "fix," not "recommend," capital punishment, should be applied retroactively to invalidate appellant's sentence. *Tamme* disallowed use of the word "recommend" in favor of "fix" when referring to the jury's role in imposing the death sentence. Appellant argues that if *Tamme* were applied to his case, use of "recommend" would have been reversible error under Kentucky law. He therefore urges that we apply *Tamme* retroactively and grant him relief. How-

[8]Note that although the phrase still exists in the statute, use of "recommend" is now prohibited in Kentucky. *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988).

ever, to say that Kentucky law now prohibits use of the word "recommend" when referring to the jury's sentencing role does not make out a *constitutional* error. Because this case is before us on habeas review, we are limited to granting relief for violations of the "Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), and we can give relief for state court error only where the alleged error is of constitutional proportions. *Dupuie v. Egeler*, 552 F.2d 704, 710 (6th Cir. 1977); *Jenkins v. Bordenkircher*, 611 F.2d 162 (6th Cir. 1979), *cert. denied*, 446 U.S. 943 (1980). Failure to apply *Tamme* to appellant's case would at most make out a violation of state law only. Although using "recommend" may now violate Kentucky state law, it does not offend appellant's constitutional rights.

Appellant next claims the trial court's refusal to permit the testimony of Dr. Glen Stassen, a Christian Ethicist at the Southern Baptist Theological Seminary, violated his constitutional right to have the jury consider any evidence offered in mitigation for a sentence less than death. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983). The District Court held that Dr. Stassen's testimony was cumulative and irrelevant.

Dr. Stassen was to testify as to appellant's familial relations, his sorrow for committing the crime, his history of drug abuse, and his potential for rehabilitation. The record shows that Dr. Stassen's proposed testimony was primarily a general discussion addressing various religious and philosophical positions with regard to the death penalty. The witness had only talked to appellant for 45 minutes the morning he was to testify. As the trial court found, it added little to the jury's understanding of appellant that was not already provided by appellant's family. As *Skipper* makes clear, evidence from a non-family member is not excludable as cumulative, since the jury may give more weight to the testimony of non-family members. Nonetheless, the testimony of such non-family

members must still be shown to be relevant. *See Lockett*, 438 U.S. at 604 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstance of his offense."). We agree with the District Court that excluding Dr. Stassen's testimony was within the discretion of the trial court and that the court did not abuse that discretion. Although appellant has a right to place any evidence before the jury for purposes of mitigation, that right is limited by the fact that it be relevant, the determination of which rests with the trial judge. Moreover, exclusion, even if improper, was harmless to the extent that Dr. Stassen's testimony was cumulative to that of Reverend Thomas Feamster. Appellant's constitutional rights were not violated on these facts.

Appellant next argues his constitutional rights were violated when the trial judge instructed the jury in the penalty phase that an *aggravating* factor had to be found unanimously, but was silent with regard to how many had to agree in finding a mitigating factor. He claims this caused the jury to mistakenly believe that finding a mitigating factor also required unanimity. In reviewing this claim, we first note that errors of instruction are not reviewable in a habeas proceeding unless they work to deprive appellant of due process. *Long v. Smith*, 663 F.2d 18 (6th Cir. 1981), *cert. denied*, 455 U.S. 1024 (1982). The standard for determining this is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether it is erroneous. *Henderson v. Kibbe*, 431 U.S. 145 (1977). It is clear that the instructions given here did not "infect the entire trial" and deny appellant due process.

As the District Court held, there is nothing in the instructions that would lead the jurors to believe that finding a mitigating factor required unanimity. The instructions carefully stated that finding an *aggravating* factor required such agreement, but it cannot be reasonably inferred that silence as to

finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. The instructions were not misleading. We therefore conclude that the instruction did not deprive appellant of due process or invade any constitutional right.

Appellant next claims that his constitutional rights were violated by the trial court's failure to change venue because of adverse and prejudicial publicity surrounding the trial. He cites much data indicating there was extensive media coverage, that many people in the area knew of the case and that some had formed opinions about appellant's guilt. Despite widespread publicity, however, we find that appellant's constitutional rights were not violated by the trial court's refusal to change venue.

We recognize, of course, that appellant has a sixth amendment right to be tried by a "panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The standard for determining juror impartiality in the presence of extensive media coverage was outlined in *Murphy v. Florida*, 421 U.S. 794 (1975):

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 800 (quoting *Irvin*, 366 U.S. at 723). Thus, the jury need not be totally ignorant of the case to be impartial.

In this case, the individual jurors stated they could set aside their opinions and render a verdict based on the evidence, at which point the burden shifted to appellant to show "the actual existence of such an opinion in the mind of the juror

as will raise the presumption of partiality." *Id.* The trial judge found there was no such showing, and his findings with regard to juror impartiality are to be given special deference. *See Patton v. Yount*, 467 U.S. 1025 (1984); *Brofford v. Marshall*, 751 F.2d 845 (6th Cir.), *cert. denied*, 474 U.S. 872 (1985); 28 U.S.C. § 2254(d). The court concluded after hearing testimony from several experts that there was no actual prejudice, nor was there a likelihood that appellant could not get a fair trial in the area. It found that most of the media coverage immediately before trial was descriptive of routine courtroom events and that the adverse publicity cited by appellant was over a year old at the time of trial. The trial court's finding that publicity did not prejudice the jury was not clearly erroneous. Appellant does not establish that he was denied a fair trial merely because of extensive media coverage.

Appellant next claims that he was denied due process when the trial judge denied appellant's motion that he recuse himself. The judge was represented by the Commonwealth Attorney when appellant filed a writ of prohibition against him in the Kentucky Court of Appeals to prevent the judge from hearing the case in Boone County. Relying upon *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965), he claims he was denied due process because he was prosecuted by "an advocate who has already acted as the judge's counsel in the same litigation." *Id.* at 812. As the District Court found, however, the judge was named in the suit as a nominal party only and as such was not required to recuse himself. *See General Tire & Rubber Co. v. Watkins*, 363 F.2d 87 (4th Cir.), *cert. denied*, 385 U.S. 899 (1966). Because the judge had no personal interest in the prohibition proceeding, there was no justification for his recusal. Moreover, appellant fails to indicate how he was prejudiced by the trial judge's failure to recuse himself. *See United States v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir.), *cert. denied*, 474 U.S. 908 (1985) (recusal not necessary absent specific conduct evidencing prejudice against defendant). We agree with the District Court that the record does

not reveal any conduct by the trial judge evidencing prejudice or bias by the trial court. Appellant was thus not denied due process.

Finally, appellant claims that he was denied his constitutional rights when the police erased the tape of his confession and lost a vial of pills and photo display. He first argues that Mr. Thompson's identification of him was influenced by a photo display which improperly suggested that appellant was the suspect. The display consisted of six photographs, all of them mug shots except for appellant's, which was an ordinary snapshot. Appellant argues he was prevented from making a showing to the jury that there was a substantial likelihood of misidentification because the police destroyed the display. Due process is violated where a photo display creates a "very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court set out five factors to consider in determining whether there is a substantial likelihood of misidentification. Under the first—the opportunity of the witness to view the accused at the time of the crime—Mr. Thompson saw appellant on both days prior to the shooting in his store for periods of about 30 minutes. He showed appellant a small pistol the day before, and he observed appellant just prior to the shooting. The witness therefore had ample opportunity to observe appellant.

The second *Neil* factor is the witness' attention. Mr. Thompson was interviewed by police an hour after the shooting. The interviewing officer commented on how surprised he was at Mr. Thompson's alertness and coherence. Thompson was also able to give an accurate description of appellant. We thus agree with the District Court's finding that Mr. Thompson displayed a good deal of attention. Similarly, *Neil*'s third factor—that the witness' prior description of the accused is accurate—is met in this case. Thompson said appellant looked like Kenny Rogers, had light brown hair and brown eyes, and a full beard and moustache. Thompson also

helped police in making a composite drawing of appellant that day.

Neil's fourth factor—that the witness demonstrate certainty upon confronting the accused—was also met. Although appellant was groomed differently in a lineup and the lighting was poor, he identified codefendant Kruse as being involved in the robbery and appellant as the one who did the shooting. Thompson demonstrated a good degree of certainty in making this identification.

Lastly, the amount of time between the crime and the confrontation was sufficiently short. Thompson picked appellant out of the lineup less than a month after the crime. We agree with the lower court that this amount of time was sufficiently short to guarantee reliability. When considered together, the factors outlined in *Neil* are met in this case and lead us to conclude that the photo display did not cause a substantial likelihood of misidentification. Thus, losing the photographs did not deprive appellant of the opportunity to make a showing to the jury that misidentification was an issue.

Moreover, the District Court was correct in holding that destruction of the photo display did not constitute constitutional error. *California v. Trombetta*, 467 U.S. 479 (1984) held that to show constitutional error in destroying evidence, it must be apparent that the evidence had exculpatory value and that appellant would not be able to get comparable evidence by any other reasonable means. *Id.* at 488-89. Here, appellant could have cross-examined Thompson to determine whether he was influenced by the format of the display. In addition, it cannot be said that the display had apparent exculpatory value or would play any part in appellant's defense at the time it was lost.

Appellant also claims the police misplaced a vial of pills which he hoped to use in his defense of diminished capacity through drug use. This claim is wholly without merit. Under the *Trombetta* test, the vial of pills did not have apparent

exculpatory value. Indeed, appellant himself only claims that he was denied his right to present "a complete defense" by showing that he possessed drugs at the time of the crime. More significantly, the vast majority of his evidence at trial regarding drug ingestion and intoxication came from his own statement to the jury and from those who saw him immediately before and after the crime. Appellant had and utilized several avenues for showing that he was drugged and intoxicated. The failure to preserve the vial did not deny him this defense.

Appellant asserts that his constitutional rights were also violated when the police erased the tape of his confession. Appellant claims that he could not make a complete pre-trial attack of the confession without the tape, since it alone revealed the tenor and tone of the interrogation. With it, he hoped to make a pre-trial challenge on due process and fifth amendment grounds.

This claim similarly has no merit. First, although the Kentucky Supreme Court urges officials to keep recordings of confessions, *Hendley v. Commonwealth,* 573 S.W.2d 662, 667 (Ky. 1978), the police may dispose of them unless defense counsel specifically asks that they be preserved. Here, appellant's confession was erased before a request was made to preserve it. Second, its erasure did not preclude appellant from making a meaningful challenge to his confession. The confession was in permanent, transcribed form. The dialogue, questions, and other relevant aspects of the interrogation were available for appellant to challenge. Although the verbal tone and tenor of the interrogation was lost with the tape, appellant admitted that the transcript accurately reflected the interrogation. He cannot now disavow that admission and claim it was not accurate. Also, the tape's exculpatory value was not apparent to the police at the time it was erased.

Any doubt that the state's failure to preserve these pieces of evidence did not amount to a denial of due process was

laid to rest by the Supreme Court in *Arizona v. Youngblood*, 109 S. Ct. 333 (1988). *Youngblood* held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 337. In *Youngblood*, the police failed to preserve the semen-stained clothing of a rape victim, which the defendant sought to use to prove his innocence. The Court said that the "failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent." *Id.* In the present appeal, appellant makes no allegations or showing that the police acted in bad faith in erasing his taped confession or losing the vial of pills and photographic display. We find no constitutional error upon which to grant appellant habeas relief.

CONCLUSION

Upon review of the record and consideration of all of appellant's claims, we conclude that appellant failed to establish that any constitutional right was offended in the Kentucky trial court. Accordingly, we AFFIRM the District Court's judgment denying appellant's petition for a writ of habeas corpus.

WELLFORD, Circuit Judge, concurring.

I concur generally in my colleague's well considered opinion in this difficult case but write separately on the issues most troubling. First and foremost, I find no reversible error in the guilt phase of the proceeding in which Kordenbrock was convicted of murder and attempted murder and pleaded guilty to armed robbery. The most serious question raised in this respect concerned the circumstances of Kordenbrock's confession to police officers after being taken into custody.

The officers followed the prescriptions of the warnings to the defendant set out in *Miranda v. Arizona*, 384 U.S. 436 (1966), which "promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subjected to custodial police interrogation." *Michigan v. Mosley*, 423 U.S. 96, 99 (1975). The latter case discussed in particular the custodial suspect's "option to terminate questioning," which must be "scrupulously honored." 423 U.S. at 103. *Mosley* decided that "admissibility of statements obtained after the person in custody has decided to remain silent" must be denied in order to effectuate the protections sought to be achieved in *Miranda*. *Id.* at 104.

I cannot reach any conclusion but that the Kentucky officers involved in the questioning of defendant did not carefully observe Kordenbrock's option to postpone the custodial interrogation. I agree, however, that Kordenbrock did voluntarily confess to them during the initial phase of the questioning that he committed the shootings of the two victims. In my view, then, the officers should have been permitted to testify that Kordenbrock confessed to the shootings but should not have been permitted to introduce the details, including the full written version.

The error in admitting the more detailed admissions of Kordenbrock's admissions constituted, in my view, harmless error. Kordenbrock was well aware of his situation in discussing the charges, he had experience in dealing with police and

was generally accountable for knowing his rights in this respect. The evidence of guilt, apart from the confession, was very strong. I therefore find no error in the rationale of the district court in its discussion of this issue and also find *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985) on point. *See also Burks v. Perini*, No. 85-3507 (6th Cir. Nov. 25, 1986) (unpublished opinion). It should be pointed out that the decision in *Michigan v. Mosley* overturned a Michigan appellate decision which reversed a murder conviction based on an overly strict interpretation of *Miranda* and striking of a confession after the defendant had at first indicated he did not want to answer questions. The point in *Mosley* was that the defendant had not indicated that he persisted in his initial decision to remain silent.

The trial court's decision to admit the entire confession no doubt impacted upon defendant and his course at trial, on advice of his counsel, at the guilt stage to admit guilt to the jury in an opening statement but to try to set out extenuating or mitigating circumstances of the murder without having to take the witness stand under oath. This action complicates the confession issue for me, but it does not affect my conclusion that only harmless error was involved beyond a reasonable doubt. That these circumstances may complicate this issue should not be taken as a criticism of counsel's strategy in this respect faced with the enormity of the factors and proof arrayed against his client. I cannot say, however, that defendant would have adopted this trial strategy had most of the confession details been excluded, nor can I agree with the district court that this was a "deliberate waiver of any *Miranda* violation." 680 F. Supp. at 880.

The second difficult question revolves around the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985) and defendant's asserted constitutional right to an independent psychiatrist under the circumstances. Emphasis in *Ake* throughout is upon the fact that defendant presented a "sole defense" of "insanity." 470 at 72. At the initial opportunity, at a pre-

trial conference, Ake's attorney "informed the court that his client would raise an insanity defense." *Id.* at 72. The trial court was aware that at and after arraignment defendant's conduct had been so "bizarre" that he was ordered examined for competency to stand trial. The defendant's request was denied and the court emphasized that "there was no expert testimony for either side on Ake's sanity at the time of the offense." *Id.* at 72.

The court's holding addressed this particular issue of "sanity" stating:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

470 U.S. at 74.

The court in *Ake* explained that the basis for this holding was that this afforded the indigent defendant "a fair opportunity to present his defense." *Id.* at 76. The other holding in *Ake* related to the penalty phase of that case where the state presented psychiatric testimony regarding the future dangerousness of the defendant. In that specific factual setting, *Ake* held:

> Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, . . .on which the prosecutor relied at sentencing. We therefore conclude that Ake also was entitled to the assistance

> of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.

470 U.S. at 86, 87.

Justice Burger, concurring in *Ake*, took pains to caution about the narrow application of the holding by stating "[T]he facts of the case and the question presented confine the actual holding of the Court."

The facts in this case, by contrast, indicate that defendant never presented an insanity defense to the court or jury. The trial judge, who made extensive efforts to provide Kordenbrock expert psychiatric assistance, was apparently under the impression that Kordenbrock was claiming insanity or that his counsel was investigating an insanity plea. The district court found that he was hoping "to raise a defense of diminished responsibility" based on "habitual use of drugs." 680 F. Supp. 872. The district court determined that it became "apparent" that Dr. Nizny, the psychiatrist consulted who was approved by the court to serve to assist defendant "would not be helpful to Kordenbrock's case." 680 F. Supp. 872. I do not believe a fair reading of the evidence supports that view,[1] but I conclude the district court was not in error in finding that the failure of the state to provide payment for Dr. Nizny's services did not deprive defendant of a "fair opportunity to present his defense," within the meaning of *Ake*.

Justice Marshall, author of *Ake*, himself observed "we limit the right we recognize today," and thus it did not impose a heavy financial burden on the state.[2] 470 U.S. at 79.

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[1]I do find support for the district court's view that defense counsel pursued a "deliberate defense strategy" not to cooperate with available "neutral" state employed psychiatrists who might have provided defendant testimony or evaluation beyond the stated policy limits of "competency and sanity." 680 F.Supp. 873.

[2]Justice Leibson, the dissenting judge in the Kentucky Supreme Court in the direct appeal properly, in my view, pointed out that the

Defendant did present expert testimony on the effect of his drug habits and his ingestion prior to the murder. He was not precluded from presenting a diminished capacity defense. *Ake* does not compel a conclusion that constitutional error occurred with respect to expert and psychiatric testimony available to this defendant either at the guilt stage or the penalty stage of this case. Diminished capacity, like mental retardation, may well be a mitigating circumstance, but as recently indicated by the Supreme Court, existence of limited mental capacity does not preclude a jury's finding of the death penalty under appropriate circumstances. *See Perry v. Lynaugh*, _ U.S. _, 106 S. Ct. 256 (1989).

One must comment on the failure of the police to retain evidence of the photo spread and the bottle of pills in this case. These failures deserve approbation but they do not constitute reversible error as found by the district court.

Finally, Kentucky law on the question of the jury's role in the death penalty process has created some confusion in this case prior to its clarification. As noted by the Kentucky Supreme Court, "[T]he word 'recommend' was used, but not to such an extent as to denigrate the responsibility of the jury in imposing the death penalty." 700 S.W.2d at 389.

As well set out in my colleague's opinion and analysis, there was no "affirmative misstatement or conduct that misleads the jury as to its role" in this case. *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir. 1988).

I therefore concur in the decision to affirm the denial of habeas corpus relief.

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trial court acted within its authority in ordering Boone County to provide private psychiatric services for Kordenbrock and should have taken necessary steps to enforce its order. 700 S.W.2d 389, 390. This failure on the part of the cou rt; defendant's counsel's failure to pursue; and the recalcitrance of Boone County to provide payment for Dr. Nizny do not, however, constitute a *constitutional* deficiency.

PAUL KORDENBROCK, Petitioner

V.

GENE SCROGGY, WARDEN, KENTUCKY
STATE PENITENTIARY, Respondent

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION
FEBRUARY 16, 1988

[pertinent portion reproduced below]

ISSUES III AND IV - WHETHER ADMISSION OF PETITIONER'S CONFESSION CONSTITUTES REVERSIBLE ERROR.

Following his arrest and interrogation on January 6, 1980, Kordenbrock confessed to the robbery of the Western Auto store in Florence, Kentucky, and to the shooting of the two store clerks in the course of the robbery ([Stanley] Allen and [Bill] Thompson). Allen was killed but Thompson survived as an eye witness.

On April 29, 1981, Kordenbrock filed a motion and memorandum asking the Boone County

Circuit Court to suppress his confession, contending that he had attempted on three occasions during the police interrogation to cut off questioning but that it had continued in violation of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

Following an evidentiary hearing on Kordenbrock's motion, the trial judge refused to suppress the confession, finding inter alia, that Kordenbrock had not been under the influence of drugs or alcohol at the time and that he had demonstrated a willingness to confess.

In its opening statement at trial, the Commonwealth informed the jury that Kordenbrock had been interrogated and that he had confessed to the robbery/murder. Immediately thereafter, Kordenbrock personally gave an opening statement in which he admitted his participation in the

robbery and his shooting of the two store clerks explaining that he had been "all messed up" from liquor and quaaludes he had ingested during the previous night and on the morning of the robbery. He further stated that he did not know why he had shot the clerk but now deeply regretted his act. He did not testify again at trial.

Immediately prior to the trial, petitioner's counsel had stated for the record:

> "[P]ursuant to your overruling our pretrial motions, our position has been limited and we . . . are . . . still maintaining the incorrectness of your rulings on our pretrial motions and the position we have taken today in no way is a waiver of those positions we had taken prior to this trial actually commencing."

T.E. Vol. XXVI 3764-65.

Petitioner's opening statement in its entirety was as follows:

"By Mr. Kordenbrock

"Good morning, ladies and gentlemen, Once again, I would like to introduce myself. My name is Paul Kordenbrock. Please let me thank you for your patience and attention during this jury selection. I am pretty nervous being up here so if I make a mistake, please forgive me in correcting myself. In fact, I wrote this down and am reading it because I am nervous and don't want to forget anything.

"I would like to show you what the evidence will show happened on January 5, 1980. The evidence will show that I woke up that morning around 8:15. While getting dressed I was feeling pretty hungover from a party the night before. I immediately ate a 714, which is a street name for a Qualude [sic]. We arose so early that morning because Karen's Mom was coming over to help her clean the apartment and Mike and Karen weren't getting along at the present time so we decided to leave before her mother arrived. After getting dressed I entered the kitchen where the girls were having their morning coffee and discussing what their day consisted of. I reached for a beer and Mike joined me. We all agreed it was a good party we had attended the night before.

"While talking to Mike, Mike and myself decided to finish off the six pack in the refrigerator and head for Kentucky to look up Richard Fehler and try to wheel and deal with him concerning this cassette tape deck he mentioned he might want to sell. Reaching for another beer I grabbed all four of them and asked Mike if he felt like shotgunning them. After the first one I reached into my pocket and pulled out a bottle of 714s, which are street names for Qualudes [sic]. I gave Mike one and took one myself and then I asked the girls if they wanted one. Two of them excepted [sic]. Then we shotgunned the remaining beers and said we would see the girls later.

"While crossing the I-75 bridge we decided to grab a sandwich and we got off at the 5th Street exit, stopped and both ate a Ham and Cheese sandwich. I asked Mike if he thought his friend would trade some 714s for some pot I had. Mike said that we needed some gas and could ask him while filling up at the Working-man's gas station up here on this exit. While filling the tank we also bought ten Qualudes [sic]. We both ate two and headed out. While buying an ax the prior Thursday we saw a couple of Cole Python Pistols. We were purchasing the ax to split fire wood at my camp on Eagle Creek.

After pulling out Mike said, 'let's go get the guns, we can sell them and get some more drugs.' After parking the car I reached under the seat and grabbed a gun. When we entered the store I approached Mr. Thompson and asked him to go to the back. When we got to where Mr. Allen was I told them to lie down and then a customer came in and I told Mike to get rid of him. I was standing there all messed up from the night before and what I had already consumed that morning. At that time I heard the crashing of glass and I am not sure what caused my next movements, but I shot both men. Then I ran to the front of the store and Mike had the guns and we left. I never intended to shoot anybody. It just happened. I ran around the next day and a half trying to sell the guns. I got arrested the next Sunday night and told them I did it and it is something that I have been living with for the past eighteen months and twenty-six days. I don't know how to put it in words how I feel.

"Thank you."

T.E. Vo. XXVI 3760-63.

In his closing argument on the guilt phase, petitioner's counsel stated:

"There can be no doubt in your minds that Paul robbed the Western Auto Store. There can be no doubt in your mind that Paul shot Bill Thompson. There can be no doubt in your mind that Paul killed Stanley Allen, cause that is what the evidence has been. Paul pled guilty to the robbery and he told the Judge that he was guilty of that. And Paul, when he was arrested on Sunday evening confessed to the people who arrested him and he told them that he did it. And a few days ago Paul sat in this chair and told you what the evidence would be. And he told you that the evidence would be that he robbed the Western Auto Store, that he shot Bill Thompson, and that he killed Stanley Allen. He has never denied doing that. T.E. Vol. XXX 4429.

* * * * * *

"And it is your job to fit the facts of this case into which instruction, because there is no doubt that the acts were committed by Paul. The question is, how will you punish him?"

T.E. Vol. XXX 4432.

After the jury returned the guilty verdict, petitioner's counsel and witnesses several times referred to petitioner's

willingness to confess as a mitigating factor. For example, Mr. Monohan said in argument out of the hearing of the jury:

> "This is a mitigating factor. Because his position all along has been that he will plead guilty and admit guilt to murder if sentence is life imprisonment. This jury has a right to know that he has not intended otherwise, and they have a right to factor that into their determination."
>
> T.E. Vol. XXXI 4648.

And petitioner's witness, Reverend Feamster, stated:

> "Yes, bibically, [sic] of course, confession is a crucial part in our own process of redemption and Paul has confessed to God, to me, and to others and to his family what he has done and he is sorry for that. He would like to have a chance to try to make up for that and to try and develop his life in a way -- and that is what we talk about bibically [sic] when we speak of redemption."
>
> T.E. Vol. 4684.

The issues presented to the court with regard to the admissibility of petitioner's confession are:

> (1) Was the confession the result of unconstitutional coercion on the part of the police?
>
> (2) Was the confession obtained in violation of the Miranda procedures?
>
> (3) If Miranda procedures were violated, was the admission of the confession harmless error?
>
> (4) Alternatively, did petitioner waive any such violation by using the confession affirmatively in his opening statement and as a mitigating factor in the sentencing phase of the murder trial?

1. Coercion

Whether or not petitioner's confession was a product of coercion is an issue of fact. The state courts found that it was not. This court has made its own independent review of the record, including a careful reading of the

entire transcript of the interview which terminated in the confession. At no time was petitioner's will overborne, he was cogent and vigorous throughout the interview. He negotiated and bargained with the police regarding protecting certain female friends of his who might be implicated. Therefore, the court holds that the confession was not obtained by coercion. For cases providing general standards for determining coercion, see, e.g., Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); United States v. Murphy, 763 F.2d 202 (6th Cir. 1985); United States v. Brown, 557 F.2d 541 (6th Cir. 1977).

2. Miranda

Based on the court's careful study of the transcript, however, the court can only conclude that the confession was obtained in violation of petitioner's rights under the doctrine of Miranda v. Arizona, 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny.

This conclusion is based on the fact that several times during the interview petitioner asked that it be stopped and resumed the next day. He repeated several times, "I can't tell you no more tonight," or words to that effect. One of the officers admitted in his testimony before this court that the interrogators interpreted this as a desire on the part of the petitioner to quit, but they pressed on, because they wanted to get the matter wrapped up that night.

Of course, part of the Miranda panoply of rights is the right to have an in-custody interview terminated for any reason. This right was not respected by the police here. Although petitioner made many damaging statements prior to his first request for an adjournment of the interview, it was his final written statement given at the conclusion of it that was admitted at the trial.

Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985) (modified on other grounds, 781 F.2d 185 (11th Cir. 1986)), is directly in point on this issue and reference is made to that opinion for further discussion of the precedents involved.

The court holds further, however, that the admission of this statement was harmless error or, in the alternative, that any error was waived by petitioner.

3. Harmless Error

As has been stated, petitioner delivered his own opening statement at the trial at which time he reiterated his confession to having been one of the robbers of the store and to being the one who shot the two clerks. In the opening statement he denied knowing why he had shot the two men. This was part of a strategy to lay the basis for an argument to be made later by his attorneys that he lacked the intent to commit murder because he was under the

influence of drugs. It was also part of the defense strategy to appeal to the sympathy of the jury by having petitioner express his regret for his acts in the opening statement. This strategy was further pursued by his able counsel by having petitioner plead guilty to the robbery later in the proceedings, and by arguing during the penalty phase after conviction that petitioner had resolved to mend his ways and reform his life, as evidenced in part by his forthright confession.

Obviously, the reiteration of the confession in the opening statement was completely voluntary and made only after petitioner was fully advised of his rights by his own trial counsel. Indeed, no claim is made to the contrary.

Petitioner argues, however, that his affirmative use of his confession in his attempt to play upon the sympathies of the jury does not

constitute a waiver of the Miranda violation discussed above or render it harmless error.

The court holds, however, that the decision of the Supreme Court of the United States in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), is fatal to this position.

In Elstad, the Court held that where, as here, a first confession had been the result of a Miranda violation but was followed by a second valid confession, the second confession was admissible. The Supreme Court in Elstad rejected the same arguments made by the petitioner here, namely, that the second confession was tainted because it was "the fruit of the poisonous tree" or resulted from having "let the cat out of the bag." The Court held that these doctrines applied only to confessions which resulted from prior COERCED confessions.

Here, of course, the issue is not whether the second confesion made in open court

was admissible. Since making it was an essential part of the defenee strategy, it would have been improper to have excluded it. The issue here is whether the admission of the first confession was harmless error in light of petitioner's deliberate, fully counselled, affirmative use of his confession at trial.

Directly on point is the case relied on by petitioner to establish the Miranda violation in the first place: Martin v. Wainwright, supra, 770 F.2d at 932. There, the court held that the admission of a prior confesssion obtained in violation of the Miranda rule was harmless error in the light of the admission of a second, properly obtained confession and other evidence. The rationale of the court is highly pertinent to the matter under discussion:

G. Harmless Errror

> "To summarize, the July 4 confession, although voluntary, was obtained in violation of Miranda and hence inadmissible. Under Elstad, however, neither the

July 4 Miranda violation nor the fact that Martin had 'let the cat out of the bag' rendered the July 11 confession inadmissible. Rather, the July 11 confession, having been obtained without coercion and in full compliance with both Miranda and the Sixth Amendment right to counsel, properly was admitted at trial. We now must determine whether Martin is entitled to reversal of his murder conviction, or whether the erroneous admission of the July 4 confession was "harmless error" under the test set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

"After reviewing the entire record, we are convinced beyond a reasonable doubt that the erroneous admission of Martin's July 4 confession could not have contributed to his murder conviction. The most important factor in our decision is that the July 4 confession was merely cumulative of the evidence contained in the July 11 confession. In fact, the July 11 confession included a far more detailed description of the murder than did the July 4 confession.

"Moreover, in addition to the July 11 confession, the jury had before it the testimony of Martin's accomplice, Gary Forbes, who gave a lengthy account of the

> robbery, kidnapping, and sexual battery of Patricia Greenfield, and who told the jury how Martin, armed with a knife, led the blindfolded young woman down a dirt road at the Lantana Dump and returned fifteen or twenty minutes later, saying that he had killed Greenfield by stabbing her in the throat. Finally, the jury was presented with the unrebutted testimony of a state pathologist, who examined Greenfield's body and found the cause of her death to be the multiple stab wounds in the throat."

Id. at 932-33.

It has been stated recently that "[w]here a subsequent confession is obtained constitutionally, the admission of prior inadmissible confessions may constitute harmless error." UInited States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987) (citing Bryant v. Vose, 785 F.2d 364 (1st Cir. 1986) United States v. Packer, 730 F.2d 1151 (8th Cir. 1984). Here, as in the cases cited, the original confession was merely cumulative of the in-court statement by petitioner, the effect of which was enhanced by

his plea of guilty to the robbery of which the jury was advised with his consent. T.E. Vol. XXX 4429.

Also on point is Burks v. Perini, No. 85-3507 (6th Cir. Nov. 25, 1986) (Westlaw) [810 F.2d 199 (table)], an unpublished decision of the United States Court of Appeals for the Sixth Circuit. In that decision the admission of a confession improperly obtained under Miranda was held to be harmless error where there was a second proper confession, the defendant took the stand and testified ineffectively to self defense, and there was other strong evidence of his guilt. Id.

The general rule was well stated in People v. Auilar, 59 Ill.2d 95, 319 N.E.2d 514 (1974):

> "Though courts have not been unanimous in their reasoning, it generally has been held that if a defendant takes the witness stand and admits in substance matters contained in a confession or statement he has given the police,

> this testimony will be considered to have waived or made harmless any error that may have occurred in the admission of the confession or statement."

In determining whether there was harmless error in the admission of inadmissible evidence, the court looks "to the record for independent evidence of guilt, including in court admissions by . . . [defendant] himself." Smith v. Estelle, 519 F.2d 1267, 1271 (5th Cir. 1975). Cf. Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); United States v. Hamilton, 689 F.2d 1262, 1274 (6th Cir. 1982); Sweeney v. United States, 408 F.2d 121 (9th Cir. 1969); Rock v. Zimmerman, 543 F.Supp. 179 (M.D.Pa. 1982). See generally cases cited in 31 West's Federal Practice Digest 3d Criminal Law 337-39 (Key No. 1169.3).

Petitioner relies on Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). There three improperly obtained confessions were introduced at defendant's

murder trial. In an attempt to avoid the effect of these confessions defendant took the stand and admitted to being present at the scene of the shooting but claimed it was an accident. After conviction and appeal, the decision was reversed by reason of admission of the improperly obtained confessions. On the second trial, the defendant did not take the stand, but the prosecution introduced a portion of his testimony from the previous trial. The Court held on appeal from the second conviction that defendant's testimony at the former trial was inadmissible at the second trial because it was the fruit of the illegally procured confession.

It is doubtful whether the Supreme Court would decide Harrison the same way today. Its rationale is inconsistent with that of Elstad, supra, although the Elstad opinion does make an oblique reference to Harrison. 105 S.Ct. at 1297. Indeed, one respected district judge has held that Elstad implicitly overruled

Harrison. United States ex rel. Perri v. Director, D.O.C. State of Ill., No. 83 C. 1439 (N.D.Ill. Sept. 16, 1985) Westlaw [1985 WL 2591]) (Nordberg, J.). The court finds Judge Nordberg's reasoning to be fully applicable here. In Perri, both the Illinois state courts on appeal and Judge Nordberg held that a defendant who voluntarily takes the stand and reiterates a previous confession, as did the petitioner here, voluntarily waived any Miranda defects in the first confession, or rendered its admission harmless error. The Seventh Circuit affirmed the denial of habeas relief on other grounds. Perri v. Director, Dept. of Corrections of Illinois, 817 F.2d 448 (7th Cir. 1987).

This court holds that Harrison, if it retains any viability, is limited to its facts. In any event, Harrison is not applicable here. In Harrison, the defendant took the stand in order to give a version of the facts at variance

with his confession; that is, to attempt to avoid its effect as an admission of culpability. Here, petitioner made his statement in open court completely adopting his confession and attempting to use it to his advantage to curry favor with the jury for his forthrightness. His spirit of cooperation and contrition was emphasized over and over. He made affirmative use of the confession rather than lying to talk his way around it. The strategy was pursued further in the sentencing phase. The court holds on the basis of its careful review of the entire transcript of the trial that this was a deliberate defense strategy. The court finds that this strategy was petitioner's only hope to avoid conviction of murder and the death sentence and would have been pursued even if the original confession had been suppressed. Thus, this case is identical in this respect with the decision of the Sixth Circuit in Burks, supra, where the court held:

> ". . . the government's use of Burks' involuntary statement did not induce him to testify on his own behalf and . . . the trial court's decision to admit his confession, although erroneous under the circumstances, constituted harmless error."

Burks, No. 85-3507 (6th Cir. Nov. 25, 1986) (Westlaw) [810 F.2d 199 (table)].

Cf. Oregon v. Elstad, 105 S.Ct. at 1297, where the Court makes clear that Harrison must be limited to those situations where the admission of an improperly obtained confession induces defendant to testify in rebuttal. Here the motivation of petitioner's making a statement in open court was his desire to use the confession in mitigation.

Other evidence against petitioner, including the testimony of his accomplice, was overwhelming. Therefore, the court holds that the admission of the confession was harmless error beyond a reasonable doubt.

4. Waiver

Further, the court holds alternatively that there was a deliberate waiver of any Miranda violation. The petitioner went far beyond a mere attempt to explain away the original confession. Rather, as has been stated, he made affirmative use of it to elicit the jury's sympathy in the hope that it would not find him guilty of murder. Petitioner emphasized the voluntariness again in the penalty phase as evidence of his contrition and firm purpose of amendment. Even though this is a death penalty case, surely petitioner cannot be permitted to attack the confession in chambers while invoking it in his defense before the jury. Even in a death penalty case, a litigant should not be permitted such a flamboyant pursuit of inconsistent positions. This court holds that such efforts constitute a deliberate and knowing waiver of any informity in the original confession. Cf. McMann v.

Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (guilty plea); United States v. Higuchi, 437 F.2d 835, 837 (9th Cir. 1971); People v. Auilar, 59 Ill.2d 95, 319 N.E.2d 514 (1974).

The state cases relied on by petitioner, see e.g., Hawthorne v. State, Fla.App., 377 So.2d 780 (1979), Hall v. State, 255 Ind. 606, 266 N.E.2d 16 (1971), Ware v. State, Fla.App., 307 So.2d 255 (1975), People v. Freeman, 668 P.2d 1371 (Colo. 1083), are distinguishable because of petitioner's affirmative use of the confession. The state cases involved endeavors to negate the effects of confessions such as attempts to explain away possession of property, evidence of which had been obtained by wrongful searches.

EVERITT D. BURKS, Petitioner-Appellant, v. E.P. Perini, Superintendent, Respondent-Appellee

No. 85-3507

n* NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

810 F.2d 199

November 25, 1986, Filed

APPEAL-STATEMENT:

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

OPINION:

BEFORE: ENGEL, JONES, and KRUPANSKY, Circuit Judges.

PER CURIAM: Petitioner Everitt D. Burks (Burks) appealed from the judgment of the district court denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The operative facts are easily summarized. At approximately 7:30 p.m. on July 10, 1979, Donald Fletcher (Fletcher), his wife Sandra, and John Hernandez (Hernandez) entered the Village Inn Bar (the "bar") in Cygnet, Ohio. Burks was seated at the bar when Hernandez, Fletcher and his wife arrived. Burks and Fletcher subsequently engaged in an acrimonious conversation subsequent to which Burks left the bar, drove to his home for a shotgun which he placed in his truck and thereafter returned to the bar.

Upon returning to the bar, Burks conversed with Fletcher and Hernandez whereupon Fletcher and Burks left the bar together and were followed by Hernandez. Burks shot both Fletcher and Hernandez outside of the bar.[1]

---

[1]Fletcher died two days after the shooting.

Burks fled the scene of the crime and returned to his home. At 9:20 p.m., Burks telephoned the Wood County Jail and spoke with Russell Youngpeter (Youngpeter), a Wood County Deputy Sheriff. Youngpeter testified that Burks identified himself and stated that he had shot two people at the Village Inn. Burks further stated that he would remain at his home and await the arrival of deputies to arrest him.

George Davisson (Davisson), who was an acquaintance of Burks, was the first deputy to arrive at Burks' home. Davisson found Burks seated on his porch. As Davisson approached, Burks stated "I did a pretty bad thing, right?" After Davisson read Burks his Miranda rights and another officer retrieved the shotgun from the truck, Burks was transported to the Wood County Jail. Davisson interrogated Burks during the early morning of July 11, 1979 and elicited a statement in which Burks confessed to shooting both Fletcher and Hernandez.

Burks filed a pretrial motion to suppress the statement which he had given to Davisson on July 11, 1979. The trial court denied the motion and the case proceeded to trial.

At trial, Hernandez, the only eyewitness to the shootings apart from the accused, upon being summoned by the state, testified that Burks, without provocation, shot Fletcher in the stomach and then shot him in the back as he was running toward the bar.

Burks attempted to justify his action at trial as self-defense and testified on his own behalf. Burks stated that he shot Fletcher and Hernandez because they threatened him, the latter with a knife. However, it was undisputed that a knife had not been found at the scene of the crime.

After exhausting his state court remedies, Burks filed this petition for a writ of habeas corpus in federal district court. The

district court conducted an evidentiary hearing and concluded that Burks' July 11, 1979 statement was involuntary and should not have been admitted at his trial. However, the district court denied the writ, concluding that the introduction of the involuntary statement constituted harmless error.

On appeal, Burks charged that the district court erred in concluding that the admission of his involuntary confession was harmless error because the admission of the confession induced him to testify at his trial. See, Harrison v. United States, 392 U.S. 219, 224-25; 88 S.Ct. 2008, 2011, 20 L.Ed.2d 1047 (1968). The record disclosed that prior to making his statement on July 11, 1979, Burks telephoned the police to report the shootings and informed Davisson that he had done "a pretty bad thing." Moreover, Hernandez, who was the only eye witness to the shootings, testified that Burks had shot both men without

provocation. In light of this substantial independent evidence that Burks had indeed shot both of the victims and that the shootings were unprovoked, a self defense theory was the only recourse available to Burks to justify the shootings. Since Hernandez and Burks were the only witnesses to the actual shootings, Burks was confronted with the dilemma of permitting the jury to consider his guilt or innocence on the sole condemning testimony of Hernandez or, in the alternative, testifying on his own behalf and asserting that he shot the two men in self defense. He elected the later course of action, but failed to convince the jury of his claimed defense. Accordingly, this court concludes that the government's use of Burks' involuntary statement did not induce him to testify on his own behalf and that the trial court's decision to admit his confession, although erroneous under the circumstances, constituted harmless error.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

CONCUR BY: ENGEL

CONCUR:

ENGEL, Circuit Judge, concurring. I concur in Judge Krupansky's opinion because, like he, I believe that the admission of the confession of July 11, 1979 was harmless error, and harmless error beyond a reasonable doubt. It cannot be seriously questioned that the substance of Burks' phone call was admissible as was his volunteered statement to George Davisson made when Deputy Davisson first arrived at Burks' home. That plus the testimony of the other eyewitnesses made out most compelling proof of Burks' guilt. I would also affirm on an alternative independent ground that the state court's determination that Davisson's early morning July 11, 1979 confession was voluntary is itself entitled to respect within the meaning of LaVallee v. Delle Rose, 410 U.S. 690, 695 (1973).

STATEMENT OF PAUL KORDENBROCK

"I, Paul Kordenbrock, being of sound mind, without promises, or threats, do make the following statement to Detective Charles Seay of the Kentucky State Police and Captain Don Stamper of the Boone-Florence Felony Squad; on Saturday morning, January 5, 1980 I was at Karen Bowman's, Abby Smith, and Kelly's home at 727 Melwood Street, Cincinnati, Ohio, 45232 and phone number 541-5873. Myself and Mike Kruse left the apartment in a tan over brown Olds, Delta 88. We may have stopped and got gas, I don't know where. We then went to the Western Auto Store on U.S. 25, Florence, Kentucky. We parked the car across the street from the store. Mike Kruse was driving the car. We got out of the car and approached the store on foot. The store has double doors and we both

went in at the same time. The one man was in the rear of the store and I advised the other man to the rear. I asked him to lay face down. They followed my orders. I held a .38 caliber revolver on the two men. At this time Mike Kruse was getting the weapons. I heard the glass break where Mike was getting the guns. A customer came into the store and Mike talked to him. Then the customer left. I didn't hear what they said. I then, Paul Kordenbrock, pulled the trigger, aiming and firing at their heads so that they wouldn't get up. We had the guns in a cardboard box which I carried out of the store and across the street. Mike drove the car as we left. I was down in the seat and when I raised up we were headed south on U.S. 25 toward Walton, Kentucky. We drove to the parking lot of Wiseway Plumbing on U.S. 25 where we divided the guns. Mike drove me to my parents home, 6578 Taylor Mill Road, Kentucky. When we got to my Dad's house Mike put his share

in the trunk of the car and I put my share in the gray shed. Mike left, I don't know where he went. I got my sister, Alice, to drive me back to the girl's house in Cincinnati, Ohio. I talked to Karen and borrowed her car, a black over red Buick. I drove to Grant County, Kentucky. I went to my cousin's home, Jim Hoffman, who lives off U.S. 25. With me when I got to Jim Hoffman's home was Clark Adams, Billy Sams, Mike Obel, and I went to the house first and then the other guys came in. Shortly after that Larry Hensley came in to get hay or something. I came back out and got the guns from the car. Larry had come to the house and we started talking about price. The guns I had were still in the cardboard box that we took from the Western Auto Store. I had seven guns and Mike had seven also. Larry agreed to pay me $350.00 for the seven guns. He was to call or meet me today, 1/6/80 to pay me. We then left, Mark, Billy, Mike and myself and dropped the

guys off at Cherokee Bowl on Taylor Mill Road and I drove on back to the girl's house.

I have read the proceeding pages and they are true to the best of my knowledge. Signed, Paul Kordenbrock. Witnessed by Detective Charles Seay, Witnessed, Captain Don Stamper, Witnessed by Sergeant Sturgeon.

OPENING STATEMENT ON BEHALF OF PAUL KORDENBROCK

BY MR. KORDENBROCK:

Good morning, ladies and gentlemen, Once again, I would like to introduce myself. My name is Paul Kordenbrock. Please let me thank you for your patience and attention during this jury selection. I am pretty nervous being up here so if I make a mistake, please forgive me in correcting myself. In fact, I wrote this down and am reading it because I am nervous and don't want to forget anything.

I would like to show you what the evidence will show happened on January 5, 1980. The evidence will show that I woke up that morning around 8:15. While getting dressed I was feeling pretty hungover from a party the night before. I immediately ate a 714, which is a street name for a Qualude [sic]. We arose so early that morning because Karen's Mom was coming over to help her clean the apartment and

Mike and Karen weren't getting along at the present time so we decided to leave before her mother arrived. After getting dressed I entered the kitchen where the girls were having their morning coffee and discussing what their day consisted of. I reached for a beer and Mike joined me. We all agreed it was a good party we had attended the night before.

While talking to Mike, Mike and myself decided to finish off the six pack in the refrigerator and head for Kentucky to look up Richard Fehler and try to wheel and deal with him concerning this cassette tape deck he mentioned he might want to sell. Reaching for another beer I grabbed all four of them and asked Mike if he felt like shotgunning them. After the first one I reached into my pocket and pulled out a bottle of 714s, which are street names for Qualudes [sic]. I gave Mike one and took one myself and then I asked the girls if they wanted one. Two of them excepted [sic].

Then we shotgunned the remaining beers and said we would see the girls later.

While crossing the I-75 bridge we decided to grab a sandwich and we got off at the 5th Street exit, stopped and both ate a Ham and Cheese sandwich. I asked Mike if he thought his friend would trade some 714's for some pot I had. Mike said that we needed some gas and could ask him while filling up at the Workingman's gas station up here on this exit. While filling the tank we also bought ten Qualudes [sic]. We both ate two and headed out. While buying an ax the prior Thursday we saw a couple of Cole Python Pistols. We were purchasing the ax to split fire wood at my camp on Eagle Creek. After pulling out Mike said, "let's go get the guns, we can sell them and get some more drugs". After parking the car I reached under the seat and grabbed a gun. When we entered the store I approached Mr. Thompson and asked him to go to the back. When we got to

where Mr. Allen was I told them to lie down and then a customer came in and I told Mike to get rid of him. I was standing there all messed up from the night before and what I had already consumed that morning. At that time I heard the crashing of glass and I am not sure what caused my next movements, but I shot both men. Then I ran to the front of the store and Mike had the guns and we left. I never intended to shoot anybody. It just happened. I ran around the next day and a half trying to sell the guns. I got arrested the next Sunday night and told them I did it and it is something that I have been living with for the past eighteen months and twenty-six days. I don't know how to put it in words how I feel.

Thank you.